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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

ROY L. WONDER, et al.,

Petitioners,

vs.

LANRIC HYLAND,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED

1. Is the loss of an "opportunity to serve as a volunteer" for a public entity or official a "valuable governmental benefit" which cannot be conditioned upon speech?

2. Do the balancing requirements of *Connick v. Myers* and *Pickering v. Board of Education* apply to the "opportunity to serve as a volunteer" for a public entity or official? If so, did the Court of Appeals err in determining that balancing pursuant to *Connick v. Myers* and *Pickering v. Board of Education* is a question of fact?

3. Is the speech of a high level, confidential volunteer, relating to his volunteer activities, entitled to greater protection under the first amendment than the speech of similarly situated public employees?

II.

LIST OF ALL PARTIES

The parties to the proceedings in the Ninth Circuit Court of Appeals were petitioners ROY L. WONDER, former Supervising Judge, Juvenile Court, individually and in his official capacity; DANIEL M. HANLON, former Presiding Judge, individually and in his official capacity; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO; DENNIS SWEENEY, former Chief Probation Officer, individually and in his official capacity; FRED JORDAN, Chief Probation Officer, individually and in his official capacity; STEPHEN LA PLANTE, former Director, Juvenile Hall, individually and in his official capacity; SAN FRANCISCO JUVENILE PROBATION DEPARTMENT; SAN FRANCISCO JUVENILE PROBATION COMMISSION; and respondent, LANRIC HYLAND.

Dismissed prior to appeal by motion of respondent Hyland were John J. Walsh, the San Francisco Juvenile Justice Commission, and the San Francisco Civil Service Commission.

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Factual Background	6
B. Procedural Background	8
REASONS FOR GRANTING THE WRIT	9
I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARDS NECESSARY TO FIND A "VALUABLE GOVERNMENTAL BENEFIT" ENTITLED TO FIRST AMENDMENT PROTECTION	9
II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT DECISION IS IN CONFLICT WITH ESTABLISHED PRECEDENT AND WITH OTHER CIRCUITS	13
A. The Ninth Circuit's Decision Conflicts With Other Circuits Regarding The Rights Of Non-Employees	14
B. *Janusaitis v. Middlebury Volunteer Fire Department* Does Not Support Extending First Amendment Protections To Volunteers	18

TABLE OF CONTENTS – Continued

Page

III. THE NINTH CIRCUIT OPINION WILL DIMINISH OPPORTUNITIES TO VOLUNTEER AND IS THEREFORE CONTRARY TO SOUND PUBLIC POLICY 20

IV. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE ADDITIONAL CONFLICTS BETWEEN THE CIRCUITS REGARDING THE *PICKERING/CONNICK* ANALYSIS 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Adler v. Bd. of Educ., 342 U.S. 485 (1952) 9

Bart v. Telford, 677 F.2d 622 (7th Cir. 1982) 11

Bernasconi v. Tempe Elementary Sch. Dist. No. 3, 548 F.2d 857 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977) 12

Bd. of Regents v. Roth, 408 U.S. 564 (1972) 10

Branti v. Finkel, 445 U.S. 507 (1980) 16, 17

Bryson v. City of Waycross, 888 F.2d 1562 (11th Cir. 1989) 23

Bullfrog Films, Inc. v. Wick, 847 F.2d 502 (9th Cir. 1988) 12

Coalition for Sensible and Humane Solutions v. Wamser, 590 F.Supp. 217 (E.D.Mo. 1984), *aff'd*, 771 F.2d 395 (8th Cir. 1985) 13

Connick v. Myers, 461 U.S. 138 (1983) ..... *passim*

Domiano v. Village of River Grove, 904 F.2d 1142 (7th Cir. 1990) 19

Downtown Auto Parks, Inc. v. City of Milwaukee, 938 F.2d 705 (7th Cir.), *cert. denied*, 112 S.Ct. 640 (1991) 14, 15, 16, 17

Elrod v. Burns, 427 U.S. 347 (1976) 16, 17

Fox & Co. v. Schoemehl, 671 F.2d 303 (8th Cir. 1982) 14, 16

Germann v. City of Kansas City, 776 F.2d 761 (8th Cir. 1985), *cert. denied*, 479 U.S. 813 (1986) 23

Gonzalez v. Benavides, 712 F.2d 142 (5th Cir. 1983) 24

TABLE OF AUTHORITIES – Continued

Page

Guercio v. Brody, 911 F.2d 1179 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 1681 (1991) 23

Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988) 17, 24

Havekost v. U.S. Dep't of the Navy, 925 F.2d 316 (9th Cir. 1991) 15

Horn v. Kean, 796 F.2d 668 (3rd Cir. 1986) 14

Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17 (2d Cir. 1979)..... 18

Joyner v. Lancaster, 815 F.2d 20 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987) 23

LaFalce v. Houston, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984) 14

Loya v. Desert Sand Unified School Dist., 721 F.2d 279 (9th Cir. 1983)..... 22

Lundblad v. Celeste, 874 F.2d 1097 (6th Cir. 1989) 14, 16

Medcare HMO v. Bradley, 788 F.Supp. 1460 (N.D.Ill. 1992).....14, 17

Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)..... 12

Nieto v. San Perlita Ind. School Dist., 894 F.2d 174 (5th Cir. 1990)..... 23

Patrick v. Miller, 953 F.2d 1240 (10th Cir. 1992) 23

Perry v. Sindermann, 408 U.S. 593 (1972)..... *passim*

Pickering v. Bd. of Ed. of Township High Sch. Dist., 391 U.S. 563 (1968)..... *passim*

Rankin v. McPherson, 483 U.S. 378 (1987) 12

TABLE OF AUTHORITIES – Continued

Page

Rivera Diaz v. Puerto Rico Telephone Co., 724 F.Supp. 1069 (D. P.R. 1989) 14, 16

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 11, 12, 13, 17

Sanjour v. Environmental Protection Agency, ___ F.2d ___ 1993 WL 15142 (D.C. Cir. January 29, 1993) 23

Shapiro v. Thompson, 394 U.S. 618 (1969) 12

Sherbert v. Verner, 374 U.S. 398 (1963) 12

Speiser v. Randall, 357 U.S. 513 (1958) 12

Sorrano's Gasco, Inc. v. Morgan, 874 F.2d 1310 (9th Cir. 1989) 12

Thomas v. Carpenter, 881 F.2d 828 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990) 12, 17, 23

Versarge v. Township of Clinton New Jersey, ___ F.2d ___, 1993 WL 20115 (3rd Cir. February 2, 1993) . .5, 23

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PETITION FOR WRIT OF CERTIORARI

Petitioners Roy L. Wonder, et al., (Petitioners) respectfully pray that a Writ of Certiorari be issued to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 972 F.2d 1129 and is reprinted in the Appendix to this petition at App. 1.

The unreported judgment issued by the United States District Court, Northern District of California (Patel, J.), is reprinted in the Appendix to this petition at App. 34-50.

JURISDICTION

The district court's jurisdiction was based on 42 U.S.C. sections 1983 and 1985.[1] On October 9, 1990, the district court issued its judgment dismissing the entire action. See App. 34-50.

On August 21, 1992, the Ninth Circuit entered a decision reversing in part the judgment of the District Court. The Ninth Circuit had jurisdiction under 28 U.S.C. section 1291.

On December 10, 1992, the Ninth Circuit denied petitioners' request for rehearing or rehearing *en banc*. See App. 51.

This Court has jurisdiction to review the judgment of the Ninth Circuit under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

[1] On appeal, Respondent abandoned his claims based on 42 U.S.C. section 1985.

or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 42 U.S.C. section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Ninth Circuit decision in this case opens the federal courts to lawsuits alleging the deprivation of an entirely new and almost unlimited class of protected "valuable governmental benefits." The Court of Appeals has created a "right to volunteer," the denial of which is entitled to scrutiny under the first amendment. In doing so, the court has abandoned a critical line drawn in *Perry v. Sindermann* and its progeny, between those benefits the Constitution protects, and those it does not.

The Ninth Circuit holds that an unpaid volunteer in San Francisco's locked juvenile detention facility may assert a claim under 42 U.S.C. section 1983 when "the

opportunity to serve as a volunteer" is allegedly denied in retaliation for speech. The decision is in conflict with at least four other circuits which uniformly find that non-employees such as independent contractors are *not* entitled to petition the federal courts for such protection.

In granting sweeping protection to the "opportunity to serve as a volunteer," the Ninth Circuit concludes that volunteering is a "valuable governmental benefit" entitled to review under the first amendment because "a person gains valuable experience and education in public administration and can make professional contacts" and because the "opportunity to serve as a volunteer" "provides an individual the satisfaction of making a contribution or giving something back to society."

Outside the area of volunteerism, the Ninth Circuit's broad analysis opens the federal courthouse doors to an endless variety of new claims based on the withdrawal of government programs or benefits that subjectively could provide valuable "experience" or "satisfaction." In reaching this conclusion, the Ninth Circuit abandons the essential limitations on the concept of "valuable governmental benefits" recognized in *Perry v. Sindermann*, 408 U.S. 593 (1972). In their place, the Ninth Circuit creates a whole new class of protected benefits. This new class consists of anything withheld by government which has, or may be claimed to have subjective value to the claimant.

All of the "valuable governmental benefits" that federal courts have previously recognized as entitled to first amendment protection meet at least three criteria: They are (1) created as a result of an official and formal act of

government (generally a law); (2) "valuable" in terms which are capable of being objectively measured; and (3) of direct and immediate benefit to the claimant. The "opportunity to volunteer" cannot meet any of these essential criteria.

This Court has not had an opportunity to consider the meaning of the term "valuable governmental benefits" since that standard was recognized in *Perry*. Until the present case, the trend among district and circuit courts had been to limit the scope of benefits entitled to constitutional protection. Even so, in the two decades since *Perry*, the lower courts have adopted analyses which are diverse and often unclear. Moreover, another circuit has already relied on the Ninth Circuit's decision here. See *Versarge v. The Township of Clinton New Jersey*, ___ F.2d ___, 1993 WL 20115 (3rd Cir. February 2, 1993). As the *Versarge* decision shows, without direction from this Court, the now broad split among the circuits as to the scope of the benefits entitled to first amendment protection will continue to grow.

The principles at stake in this case are also extraordinarily important. Government officials frequently call upon citizens to volunteer their time for public projects. Few would contest, for example, a sheriff's prerogative to select volunteers for an advisory panel on the operation of the jail who share his views on penal reform. Nor would his legal right to remove a panel member who publicly criticized him be disputed. Under the Ninth Circuit decision, however, such important and sensitive decisions may become the subject of litigation. Federal courts and officials are opened to a broad range of new legal challenges based on a whole new class of "benefits

and privileges" where someone is allegedly denied the "satisfaction of making a contribution," or the opportunity to "make professional contacts" or to "gain experience and education in public administration."

The loss of one's livelihood or the loss of a valuable benefit such as welfare presents the kind of compelling circumstance that courts have held warrants such an inquiry. No similar justification for judicial intervention exists here.

A. Factual Background[2]

Lanric Hyland (Hyland), a convicted felon, volunteered to provide unpaid, volunteer assistance to the Chief Probation Officer (Sweeney) of the San Francisco Juvenile Probation Department (Department). The Department operates a secure facility for the detention of youths accused of serious crimes. Although as a convicted felon, Hyland was ineligible for employment as a peace officer, he hoped to someday obtain a pardon from the Governor of the State of California and obtain paid employment in the criminal justice field.

Faced with a limited budget and the need to address a number of deficiencies in the Department, Sweeney accepted Hyland's services as his personal assistant. Sweeney gave Hyland the title "Special Assistant to the Chief Probation Officer." Sweeney also gave Hyland access to the secured areas of Juvenile Hall. Sweeney considered Hyland to be "a valued and trusted assistant"

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[2] The following facts are set forth in plaintiff's 100 page complaint and accompanying exhibits.

who provided "invaluable executive assistance." In this capacity, Hyland worked closely with Sweeney and was privy to sensitive, work related confidences. Sweeney also personally attempted to assist Hyland in obtaining a pardon from the Governor.

In February 1989, Sweeney asked Hyland to draft a confidential performance appraisal of the then Director of Juvenile Hall, Mr. La Plante (La Plante). Hyland prepared an extremely negative appraisal. He then asked Sweeney to issue the appraisal and recommend termination of La Plante. Sweeney refused. Hyland then prepared a memorandum to the Superior Court judges supervising the Department. The memorandum urged the judges to terminate La Plante. It asserted that the many, well-known deficiencies of the Department were the result of La Plante's incompetence.

On February 28, 1990, before sending the memorandum, Hyland showed it to Sweeney. Upon seeing to whom the memorandum was addressed, and without reading it, Sweeney informed Hyland that his volunteer services were no longer desired. Sweeney also demanded that Hyland return his keys to the Department. Hyland later sent copies of the memorandum to the judges, the Juvenile Justice Commission and the California Youth Authority.

The memorandum, entitled "Stephen La Plante's Performance as Director of Juvenile Hall," consists of eight pages which detail Hyland's opinion regarding La Plante's deficiencies as Director of Juvenile Hall. The

memorandum tracks the performance evaluation drafted by Hyland at Sweeney's request. The clear purpose and thrust of the memorandum was to call for La Plante's termination and to urge the appointment of another individual considered more qualified by Hyland. In support of the analysis, the memorandum described conditions at Juvenile Hall, all of which were matters of public record at the time.

B. Procedural Background

On March 2, 1990, Hyland initiated this action. No process was issued on the original complaint. On May 17, 1990, Hyland filed an amended complaint under 42 U.S.C. sections 1983 and 1985. The complaint alleged civil rights violations under the first and fourteenth amendments and also alleged pendant state claims.

On October 9, 1990, the Honorable Marilyn Hall Patel of the United States District Court for the Northern District of California dismissed the complaint for failure to state a claim. Federal Rule of Civil Procedure 12(b)(6). In so ruling, the District Court found that Hyland had no property or liberty interest in his unpaid volunteer position with the San Francisco Department of Juvenile Probation. The District Court also found that Hyland's free speech rights were not violated under the standard set forth in *Connick v. Myers*, 461 U.S. 138 (1983).

On August 21, 1992, the Ninth Circuit affirmed the District Court's ruling as to the fourteenth amendment claims but remanded the first amendment claims for balancing pursuant to *Connick*. The Ninth Circuit specifically held that the opportunity to serve as a volunteer is "a

valuable governmental benefit or privilege" which cannot be withheld in retaliation for speech. Concluding that Hyland's memorandum addressed matters of public concern, the Ninth Circuit ruled that the balancing required by *Connick* raises a question of fact rather than law. Rehearing was denied on December 10, 1992. App. 51.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARDS NECESSARY TO ESTABLISH A "VALUABLE GOVERNMENTAL BENEFIT" ENTITLED TO FIRST AMENDMENT PROTECTION.

Until the 1950's this Court embraced the view that although public employees and recipients of public benefits had a virtually unfettered right to express their opinions, the first amendment did not prevent the denial of public employment or benefits based upon that speech. *Adler v. Board of Educ.*, 342 U.S. 485 (1952).

In the next two decades this Court actively repudiated the logic typified by *Adler*. Two broad lines of cases emerged. One limited public employers' ability to condition employment on the relinquishment of constitutionally guaranteed rights. This line of decisions culminated with the decision in *Perry v. Sindermann*, 408 U.S. 593 (1972).

> [E]ven though a person has no 'right' to a *valuable governmental benefit* and even though the government may deny him the benefit for any number of reasons, there are some reasons upon

> which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.

Id. at 597 (emphasis added).

As examples of "valuable governmental benefits," the *Perry* court cited cases involving unemployment benefits, tax exemptions and welfare benefits. "But, most often," the *Perry* court observed, "we have applied the principle to denials of public employment." *Id.*

A second line of decisions, the "new property cases," held that under certain circumstances, state law creates an entitlement or "property right" to specific jobs or benefits, which can be removed only after a due process hearing. Accordingly, such rights cannot be taken away except upon a showing of a legally sufficient, non-arbitrary reason. See e.g. *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972).

Thus, until the Ninth Circuit decision here, the federal courts recognized two classes of benefits which could not be denied or restricted for impermissible reasons including the exercise of the right to free speech – vested property rights and "valuable governmental benefits." Both are inherently limited. Property rights, which include vested rights to public employment, may only be found where state law creates a vested entitlement to a benefit. *Ibid.* Similarly, the scope of the phrase "valuable governmental benefit" is limited by the context and analysis of *Perry*.

Only by taking its language out of context may *Perry* be read to expand first amendment protection to the

"opportunity to serve as a volunteer." The three non-employment related examples of "valuable governmental benefits" cited by *Perry* – involving unemployment benefits, welfare, and tax exemptions – share common characteristics not shared by the "opportunity to volunteer." Each of the three benefits is: (1) created as a result of an official and formal act of government (generally a law); (2) "valuable" in terms which are capable of being objectively measured; and (3) of direct and immediate benefit to the claimant. No reported case prior to the Ninth Circuit decision in *Hyland* has expanded first amendment protection to benefits that do not meet these essential criteria (referred to in the petition as the "*Perry* Standard").

The Ninth Circuit cites *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) for the proposition that "even an act of retaliation as trivial as failing to hold a birthday party for a public employee," if part of a pattern of harassment, may give rise to a first amendment claim. 497 U.S. at 76 n. 8 relying upon *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982).

In advancing this proposition, however, the Court of Appeals misses the key point. A trivial retaliatory act – or a significant retaliatory act – may be actionable only if it affects a *nontrivial right* that is a "valuable governmental benefit." Indeed, both *Rutan* and *Bart* involve claims of retaliation based upon the most firmly established governmental benefit, public employment.

Significantly, the *Hyland* panel's own analysis demonstrates that the kinds of benefits or privileges recognized to date as entitled to protection are benefits with

more than the abstract or potential value of volunteering. Of the eleven cases cited, six are based upon public employment.[3] The other five involve benefits that meet the three *Perry* criteria: *i.e.*, they are created by statute, objectively valuable, and of direct and immediate benefit to the recipient. The benefit at issue in *Shapiro v. Thompson*, 394 U.S. 618 (1969), was the right to welfare assistance set forth in a state statute; in *Sherbert v. Verner*, 374 U.S. 398 (1963), the right to unemployment compensation set forth in a state statute; in *Speiser v. Randall*, 357 U.S. 513 (1958), the right to take a tax exemption established by the California Constitution; in *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989), the right to bulk use plant permits which were formally issued by a county pursuant to district rules, regulations and state code; and in *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988), the right to receive exemptions from import duties which were provided by a federal treaty.

Volunteerism is manifestly distinguishable. First, volunteer opportunities such as the kind at issue here are not the product of any formal action by the government such as a law or regulation. Rather, they generally arise from informal arrangements between members of the public and individual government employees, such as Sweeney (Chief Probation Officer) and Hyland.

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[3] *Perry v. Sindermann, Id.*; *Rankin v. McPherson*, 483 U.S. 378 (1987); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990); *Bernasconi v. Tempe Elementary Sch. Dist. No. 3*, 548 F.2d 857 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977); *Rutan v. Republican Party, supra*.

Second, the value of volunteerism is not objectively measurable in a way comparable to the "benefits and privileges" recognized to date. Unlike welfare benefits, unemployment compensation and tax exemptions, volunteering does not provide a tangible financial benefit to the volunteer. Similarly, unlike public employment, volunteering does not provide "regular paychecks, health insurance and other benefits." *Rutan, supra,* at 2738. In most instances, the benefit to the volunteer is simply the spiritual reward of doing good.

Finally, whatever subjective benefit volunteering may have to the individual volunteer, the value is entirely indirect and speculative. Admittedly, under ideal circumstances, volunteering may lead to better things – perhaps even providing the experience needed to apply for a paying job. Even this benefit, however, is at best indirect, speculative and remote. Cf., *Coalition for Sensible and Humane Solutions v. Wamser,* 590 F.Supp.217, 221 (E.D.Mo. 1984), *aff'd,* 771 F.2d 395 (8th Cir. 1985). Such ancillary intangible benefits contrast sharply with unemployment compensation, welfare benefits and other privileges previously recognized as entitled to first amendment protection.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT DECISION IS IN CONFLICT WITH ESTABLISHED PRECEDENT AND WITH OTHER CIRCUITS.

There have been relatively few occasions in which courts have been called upon to assess whether the loss of a particular alleged benefit is actionable under the first

amendment. Where courts have considered this issue they have acted without recent direction from this Court, and, as a result, their analyses are diverse and often unclear.

A. The Ninth Circuit's Decision Conflicts With Other Circuits Regarding The Rights Of Non-Employees.

Circuit court decisions following *Perry* and cases cited therein have consistently limited the scope of first amendment protections for non-employees. *Downtown Auto Parks, Inc. v. Milwaukee*, 938 F.2d 705, 710 (7th Cir.), *cert. denied*, 112 S. Ct. 640 (1991).[4]

The Seventh Circuit, for example, has held that the first amendment does not forbid a city from using speech or political criteria in awarding public contracts to independent contractors. *La Falce v. Houston*, 712 F.2d 292, 293 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984). The *La Falce* court based its decision squarely on the distinction between employees and non-employees. The court noted that independent contractors are not reliant upon government jobs for their livelihood and that the loss of a public contract " . . . is not like losing your job." *Id.* at 294. The court also expressed concern that extending protection to contractors would "invite every disappointed bidder for a public contract to bring a federal suit." *Ibid.* The Court

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[4] See also *Medcare HMO v. Bradley*, 788 F.Supp. 1460, 1465-66 (N.D.Ill. 1992); *Fox & Co. v. Schoemehl*, 671 F.2d 303, 305 (8th Cir. 1982); *Horn v. Kean*, 796 F.2d 668, 675-77 (3rd Cir. 1986); *Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989); *Rivera Diaz v. Puerto Rico Telephone Co.*, 724 F.Supp. 1069 (D. P.R. 1989).

noted that it was reluctant to extend the right to non-employees when "the competing First Amendment interests are as attenuated as they appear to be here."

The independent contractor cases appear to focus on one element of the *Perry* standard: the value of the benefit conferred. In *Downtown Auto Parks, Inc., supra,* for example, the Seventh Circuit held that the first amendment provides no protection against the failure to renew a public contract allegedly due to the speech of the contractor. The court concluded, in essence, that a public contract did not constitute a "benefit" within the meaning of *Perry v. Sindermann.*

Notably, the Ninth Circuit's decision here ignores the independent contractor cases and instead relies heavily on its own decision in *Havekost v. U.S. Department of the Navy,* 925 F.2d 316 (9th Cir. 1991). The decision asserts that *Havekost* stands for the proposition that independent contractors and licensees are entitled to protection against retaliation under the first amendment.

Havekost stands for no such proposition. There the court reversed a district court's *denial* of qualified immunity in the context of alleged first amendment retaliation against a licensee. The suggestion that the first amendment analysis would be appropriate in the context of a licensee is dictum. The court specifically observed:

> In sum, even if reversal is not required by the single fact that *Pickering-Connick's* applicability to licensees *remains an open question,* and even though Havekost's claim may not have been frivolous, we cannot rule in her favor. The law was simply not sufficiently clear to warrant

denying Banzon qualified immunity. *Id.* at 320. (emphasis added.)

To the extent that *Hyland* holds that independent contractors and licensees may bring actions for retaliation based on speech or affiliation, the decision is squarely in conflict with every other circuit that has considered the issue. See *Downtown Auto Parks, Inc. v. City of Milwaukee, supra,* 938 F.2d at 710; *Fox & Co. v. Schoemehl, supra,* 671 F.2d at 305; *Horn v. Kean,* 796 F.2d at 675-77; *Lundblad v. Celeste,* 874 F.2d 1097; *Rivera Diaz v. Puerto Rico Telephone Co.,* 724 F.Supp. 1069.

Another area in which circuit courts have limited the scope of first amendment protections is in the area of employment-related decisions based upon patronage. *Elrod v. Burns,* 427 U.S. 347, 350-351 (1976); *Branti v. Finkel,* 445 U.S. 507, 517-518 (1980).[5] Relying on *Perry, Elrod* and *Branti* hold that discharging or threatening to discharge public employees based solely on their political affiliation violated the employees' first and fourteenth amendment rights. In 1990, this Court, by a 5-4 decision, extended the *Elrod/Branti* rationale to patronage hiring,

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[5] A further limiting process occurred in regard to employment related cases when in 1983, this court refined the *Pickering v. Bd. of Ed. of Township High Sch. Dist.,* 391 U.S. 563 (1968) balancing test and limited the circumstances in which the federal court would review the employment decisions of public employers. In *Connick v. Myers, supra,* 461 U.S. 138 the court concluded that, in the absence of speech on matters of public concern, employment decisions by public employers should not be subject to judicial second-guessing in the name of the first amendment. *Id.* at 142-147.

promotion, transfer and recall after layoff. *Rutan v. Republican Party of Illinois*, 493 U.S. 62 (1990).[6]

However, even in its most far-reaching statement regarding the interaction between the first amendment and the loss of valuable governmental benefits, this Court does not provide support for the Ninth Circuit's expansive interpretation of protected benefits. In *Rutan*, this Court carefully limited first amendment protections to decisions relating to public *employment*. In its analysis, this Court relied heavily on the value of public employment – a part of the *Perry* standard. As Justice Brennan explained:

> A state job is valuable. Like most employment, it provides regular paychecks, health insurance and other benefits. . . . [T]hus, denial of a state job is a serious privation. *Id.* at 2738.

Thus, although *Rutan* significantly extended the reach of *Elrod/Branti* to encompass deprivations less onerous than discharge, *Rutan* supports limiting first amendment protections to deprivations meeting the *Perry* standard.

Courts since *Rutan* have held that the decision has no impact upon the contractor/public employee distinction and have expressly limited *Rutan* to employment-related decisions. *See, Downtown Auto Parks*, 938 F.2d at 708; see also *Medcare HMO v. Bradley*, 788 F.Supp. at 1465-1466.

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[6] The standards laid down in *Elrod* and *Branti*, dealing with political affiliation, also apply in employee speech cases. *Thomas v. Carpenter*, 881 F.2d 828, 831 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990); *Hall v. Ford*, 856 F.2d 255, 261-64 (D.C. Cir. 1988).

In summary, the Ninth Circuit decision in *Hyland* significantly expands the law regarding first amendment protection against governmental actions. Contrary to all prior case law, the Ninth Circuit decision creates from whole cloth a new third category of "valuable governmental benefit" which cannot be withheld based on speech. This new category of benefit is based not on property rights, the value of government employment or state or local statute, but on the vague, speculative, potential value of the "opportunity to volunteer."

B. *Janusaitis v. Middlebury Volunteer Fire Department* Does Not Support Extending First Amendment Protections To Volunteers.

The Ninth Circuit decision in *Hyland* relies heavily on *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17 (2d Cir. 1979). *Janusaitis*, however, does not address the issue raised here, and therefore, is not sound authority for the Ninth Circuit's holding in this case.

In *Janusaitis*, the Second Circuit considered whether a town could be held liable under 42 U.S.C. section 1983 for the disciplinary actions of a private fire fighting department. In light of the governmental nature of firefighting and the department's relationship to the town, the court found that the acts of the department were "state action." The court then reversed the personnel action of the department, applying the first amendment analysis that governs claims that a public employer has violated the first amendment rights of its employees. Neither the court nor the parties ever raised or considered whether

the "opportunity to serve as a volunteer" was entitled to the same first amendment protections as public employment.

Further, although the plaintiff in *Janusaitis* is identified as a "volunteer," volunteer firefighters have long been recognized as a special breed of volunteer, and have statutory rights to their positions. In fact, in many situations, volunteer firefighters are not "true" volunteers at all; they are paid for duty when called, appointed for fixed terms under specific statutes governing their activities and have a property interest in their positions. *Domiano v. The Village of River Grove*, 904 F.2d 1142 (7th Cir. 1990). In *Janusaitis*, the court noted that the volunteers are subject to detailed rules and regulations providing that they may be dismissed only *for cause*. 607 F.2d at 27-28. In other words, *Janusaitis had property rights to his "volunteer" firefighter position. Id.* As discussed above, vested property rights are in the first line of protected entitlements – "new property" rights that are accorded even greater protection than "valuable government benefits" under *Perry*.

In sum, there simply is no case supporting the Ninth Circuit's conclusion that the opportunity to serve as a volunteer is a valuable governmental benefit entitled to first amendment protection.

III. THE NINTH CIRCUIT OPINION WILL DIMINISH OPPORTUNITIES TO VOLUNTEER AND IS THEREFORE CONTRARY TO SOUND PUBLIC POLICY.

There are significant public policy considerations which compel a conclusion that unpaid volunteer opportunities such as Hyland's are not entitled to first amendment protection. The necessity of limiting the type of benefit entitled to protection is clear. Otherwise, almost any action taken by a government official could be determined subjectively to affect a "valuable governmental benefit or privilege" for somebody, regardless of whether a benefit was intended. The Ninth Circuit's decision in *Hyland* could subject the motivation behind virtually any governmental action to legal challenge. Such scrutiny would open government to endless litigation turning on a subjective factual assessment of benefit and motivation.

In addition, the Ninth Circuit decision will deter public officials from accepting volunteers. Government at all levels is suffering from unprecedented budgetary shortfalls. For this reason, public officials, including the last three Presidents of the United States, have recognized the need for government to rely increasingly on the efforts of volunteers. California cities and courts have encouraged the use of volunteers as a method of accomplishing needed services without the financial and legal obligations that employment relationships entail.

In its purest form, the relationship between a volunteer and the organization receiving the benefit of the

volunteer's services creates no rights for either. While extensive laws create and govern employment in California, in contrast, volunteer relationships are created and continue only while "voluntariness" exists. In other words, the parties to a volunteer relationship function with a mutual understanding: the volunteer is free to stop volunteering and the government agency is free to stop accepting the volunteer services. See generally, Flathman, "The Rights Of Volunteers," *Volunteerism in the Eighties: Fundamental Issues in Voluntary Action* (1st ed. 1982).

The factual setting of this case demonstrates another important aspect of volunteering. While the laws and regulations governing public employment may restrict a government agency from hiring an individual, similar restrictions do not inhibit volunteer relationships. For example, through volunteer relationships, individuals with a current criminal record or youths who might fail minimum screening requirements for employment, may convince a public official working with a tight budget to "take a chance" and accept his or her volunteer services. Thus, the volunteer may gain needed experience while the official accepts little risk because he or she is free to end the relationship for any reason. To the extent that volunteers obtain *rights* to volunteer opportunities, however, the equation will surely change. It will take little more than a single lawsuit to make public officials think twice about offering such opportunities to individuals who seek to give their time.

The first amendment does not protect against all disincentives to speech. It goes without saying that an unpaid volunteer who receives no benefits and has no

right to a position does not depend for his or her livelihood upon a volunteer opportunity. Whatever interest a volunteer may have in volunteering is indisputably less than a public employee, or even a contractor, may have in a relationship with a public entity. To the extent that expressing one's true views is chilled by the danger of losing a volunteer position, that disincentive is correspondingly minor when compared to the loss of a paying job or the loss of a contract. As the contractor cases demonstrate, the interest of political institutions in selecting volunteers of their choice outweighs the attenuated first amendment rights of a volunteer or potential volunteer.

IV. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE ADDITIONAL CONFLICTS BETWEEN THE CIRCUITS REGARDING THE *PICKERING/CONNICK* ANALYSIS.

In reaching its decision, the Ninth Circuit ignored established case law and rendered a decision in conflict with this Court and other circuits regarding the appropriate standards for balancing under *Pickering/Connick*.

First, the Ninth Circuit's conclusion that the balancing required by *Pickering/Connick* is a question of fact, not law, is in conflict with this Court's precedent, and the Ninth Circuit's own case precedent.[7] With the exception

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[7] In *Loya v. Desert Sands Unified School Dist.*, 721 F.2d 279, 281 (9th Cir. 1983), citing *Connick*, the Ninth Circuit acknowledged that this court had "reaffirmed" that the balancing of the complainant's interests in free speech and the interests of the

of the Sixth Circuit's decision in *Guercio v. Brody*, 911 F.2d 1179 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 1681 (1991), all other circuits that have addressed the issue consider the question of balancing to be one of law for the court, not fact for the jury. *Germann v. City of Kansas City*, 776 F.2d 761, 764 (8th Cir. 1985), *cert. denied*, 479 U.S. 813 (1986). *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987) ("the entire balancing process is for the court"); *Patrick v. Miller*, 953 F.2d 1240 (10th Cir. 1992); *Nieto v. San Perlita Independent School Dist.*, 894 F.2d 174 (5th Cir. 1990); *Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir. 1989) (jury findings on balancing only advisory – court makes final determination); *Versarge v. The Township of Clinton New Jersey*, ___ F.2d ___, 1993 WL 20115 (3rd Cir. February 2, 1993); *Sanjour v. Environmental Protection Agency*, ___ F.2d ___, 1993 WL 15142 (D.C. Cir. January 29, 1993).

Second, the Ninth Circuit failed even to address the argument that, as a matter of law, even if Hyland had been an employee, his removal from what the Ninth Circuit recognized to be a "high level volunteer position" would not violate the first amendment. The facts alleged by Hyland's complaint clearly show that he was involved in confidential, sensitive, policy issues as the personal and trusted assistant of Sweeney. As such, he fell within "that narrow band of fragile relationships requiring for

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state is a question of *law*, not *fact*. However, in 1989, the Ninth Circuit remanded a first amendment claim to the District Court for balancing as a question of fact for the jury. *Thomas v. Carpenter*, 881 F.2d 828, 832 (9th Cir. 1989). In *Hyland* the Ninth Circuit relies upon its ruling in *Thomas* to again assert that the balancing inquiry is one of fact and not law.

job security loyalty at the expense of unfettered speech." *Hall v. Ford, supra,* 856 F.2d at 264; *Gonzalez v. Benavides,* 712 F.2d 142, 150 (5th Cir. 1983).

Finally, the Ninth Circuit's analysis of Hyland's speech as involving issues of public concern would result in first amendment protection for *any* communication, even complaints regarding purely personal grievances, if the speaker includes any example or discussion of a matter which, in its own right, could rise to the level of public concern. This analysis improperly exalts the incidental recitation of collateral matters over the clear underlying *intent* of the communication.

CONCLUSION

The Ninth Circuit departed from fundamental first amendment principles and issued an opinion in conflict with other circuits. The opinion below unjustifiably expands this Court's free speech cases to create a new class of benefits and privileges entitled to first amendment protection. For these reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Lanric HYLAND, Plaintiff-Appellant,

v.

Roy L. WONDER, Supervising Judge, Juvenile Court, individually and in his official capacity, et alia; Superior Court for the City and County of San Francisco; Dennis Sweeney; Fred Jordan; San Francisco Juvenile Probation Commission; Diane LaPlante; City and County of San Francisco, Defendants-Appellees,

and

Stephen La Plante, Defendant.

No. 90-16796.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 16, 1992.

Decided Aug. 21, 1992.

Former volunteer with city juvenile probation department sued supervisor and other government officials of city and county alleging that termination of his volunteer status violated his First and Fourteenth Amendment rights. The United States District Court for the Northern District of California, Marilyn H. Patel, J., dismissed complaint for failure to state claim. Plaintiff appealed. The Court of Appeals, Tang, Circuit Judge, held that: (1) volunteer status was valuable governmental benefit or privilege that could not be denied on basis of constitutionally protected speech; (2) volunteer's memorandum criticizing operation of juvenile department discussed matter of public concern protected by First Amendment; (3) remand was required to determine

whether volunteer's memorandum was sufficiently disruptive to work environment to justify his dismissal despite protected content of speech; and (4) volunteer lacked identifiable property or liberty interest in his retention as volunteer so as to state claim for denial of due process as result of his termination.

Affirmed in part; reversed in part and remanded.

Pregerson, Circuit Judge, concurred in result with opinion.

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Vicki A. Clayton, Deputy City Atty., San Francisco, Cal., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before TANG, PREGERSON and BOOCHEVER, Circuit Judges.

TANG, Circuit Judge:

Lanric Hyland worked for a lengthy period of time as a volunteer for the San Francisco Juvenile Probation Department. In February 1989, Hyland prepared a memorandum to the judges supervising the San Francisco Juvenile Hall that detailed numerous problems at the Hall

and the failings of its director. Hyland's supervisor terminated Hyland's volunteer status and privileges immediately upon learning of the memorandum's existence. Hyland filed suit alleging that his termination constituted impermissible retaliation for protected speech in violation of the First and Fourteenth Amendments to the federal Constitution. The district court dismissed Hyland's complaint for failure to state a claim. Hyland appeals. We affirm in part and reverse in part.

BACKGROUND

The following facts are based on the allegations contained in Hyland's First Amended Complaint. Lanric Hyland was convicted of armed robbery in 1964. Since his release from prison, Hyland has concentrated his energies on developing an expertise in the administration of criminal justice. Hyland aspired to become a deputy chief probation officer in the San Francisco Juvenile Probation Department ("JPD"), a position for which he could qualify only after receiving a pardon from the Governor of California.

In May 1987, Hyland commenced work as an assistant to Dennis Sweeney, the Chief Probation Officer of the JPD. From October to December 1987, Hyland was paid for his work by the Youth Guidance Center Improvement Committee. From January through June 1988, Hyland received compensation as a non-civil service employee of the City and County of San Francisco. At all remaining times, Hyland served in the JPD as a volunteer. Hyland alleges that, at the beginning of his service, Sweeney both agreed to exert his best efforts to uncover additional

sources of compensation for Hyland and promised that Hyland's volunteer status was to continue until he received a pardon.

In June 1988, Stephen La Plante became the Director of Juvenile Hall. Sweeney had actively promoted La Plante for this position. Conditions at Juvenile Hall deteriorated rapidly under La Plante's supervision. The first nine months of La Plante's tenure saw twenty-seven escapes from Juvenile Hall. Assaults on the staff also increased. Meanwhile, the California Youth Authority threatened to sue the JPD if conditions did not improve. La Plante's allegedly unsatisfactory service as Director was a frequent topic of communication between Hyland and Sweeney in late 1988. In January 1989, Hyland assisted Sweeney in the preparation of a highly critical evaluation of La Plante.

In February 1989, frustrated by the lack of change at Juvenile Hall, Hyland drafted a memorandum to Judge Daniel Hanlon, the presiding judge of the Superior Court in San Francisco, Judge Roy Wonder, supervising judge of the Juvenile Court, and Judge Daniel Weinstein, the former supervising judge of the Juvenile Court. The eight-page memorandum documented in detail La Plante's alleged mistakes, failures, and overall incompetence in administering Juvenile Hall. Drawing upon information gleaned from his work experiences, Hyland described the precipitous decline in staff morale, accountability, and leadership at Juvenile Hall. Hyland also cited problems with the living conditions at Juvenile Hall and the treatment of minors detained there. Hyland concluded that La Plante should be terminated immediately "for the good of the youth and Staff at Juvenile Hall."

Before circulating the memorandum to the judges, Hyland shared it with Sweeney. Immediately upon receiving it, Sweeney allegedly told Hyland: "You have no right to do this. Your relationship with the Juvenile Court is finished. I want your keys [to the Youth Guidance Center] and I'm going to issue a memorandum stating you are not to be allowed into Juvenile Hall ever again."

On February 27, 1989, Hyland delivered his memorandum to the judges and provided copies to the Juvenile Justice Commission and the California Youth Authority.

In March 1989, Hyland obtained a position as a paid consultant to the National Center on Institutions and Alternatives. In June 1989, Judge Wonder informed the National Center on Institutions and Alternatives of Sweeney's ban on Hyland's access to Juvenile Hall. The National Center subsequently advised Hyland that he could not work on cases in the San Francisco Juvenile Court.

In March 1990, Hyland commenced work as a consultant to the County Clerk of San Mateo County charged with reorganizing and automating the functions of the San Mateo Juvenile Court's office.

Hyland alleges that, following his termination, Sweeney told a newspaper reporter "[J]ust ask Hyland why he can't be a peace officer in the State of California." Hyland also alleges that Sweeney threatened to take various measures designed to prevent Hyland from working in the juvenile justice system again. Hyland does not, however, contend that Sweeney actually carried through

on these threats. Sweeney and La Plante also wrote letters to the Governor of California withdrawing their support for Hyland's pardon application. Hyland alleges that Sweeney followed-up with a phone call to the Governor in March 1989, demanding that Hyland's pardon be denied because Hyland allegedly had unethically released to the public confidential information from juvenile court files. Hyland's pardon was denied in May 1989.

Hyland also charges Judge Wonder and other officials with failing to stop Sweeney and La Plante from taking steps to exclude Hyland from Juvenile Hall and related employment opportunities.

In March 1990, Hyland initiated pro se an action in federal district court against a variety of defendants, including Sweeney, La Plante, and Judges Wonder and Hanlon (collectively, "the defendants"). The complaint alleges both state and federal claims, including charges that Hyland's termination violated his First Amendment free speech rights and his Fourteenth Amendment right to due process.

After briefing and oral argument, the district court dismissed Hyland's federal action for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6). Specifically, the district court ruled that the complaint failed to articulate either a property or liberty interest protected by the Due Process Clause. The district court also found that the speech was not protected by the First Amendment, citing *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The district court then dismissed Hyland's state law claims, without prejudice, for lack of jurisdiction.

Hyland timely noticed his appeal to this court.

STANDARD OF REVIEW

We review de novo the district court's dismissal of Hyland's complaint for failure to state a claim. *Thomas v. Carpenter*, 881 F.2d 828, 829 (9th Cir.1989), *cert. denied*, 494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612 (1990). The dismissal cannot be affirmed " 'unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved.' " *Id.* (quoting *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir.1986)). All material allegations of the complaint are taken as true and are construed in the light most favorable to Hyland. *Id.*

Whether Hyland's speech is protected by the First Amendment and is a matter of "public concern" is a question of constitutional law we review de novo. *See Connick*, 461 U.S. at 148 n. 7, 103 S.Ct. at 1691 n. 7; *Roth v. Veteran's Admin.*, 856 F.2d 1401, 1405 (9th Cir.1988). Whether Hyland's termination impinged upon a protected property or liberty interest is likewise a question of constitutional law that we accord de novo review. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-78, 92 S.Ct. 2701, 2705-10, 33 L.Ed.2d 548 (1972); *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042 n. 2 (9th Cir.1985).

DISCUSSION

I. *The First Amendment Claim*

Hyland argues that the district court erred in holding that the memorandum he wrote to the judges was not constitutionally protected speech. Hyland and the defendants focus their briefs on the question whether Hyland

was a "public employee" entitled to avail himself of Supreme Court decisions insulating employee speech from retribution by superiors. But regardless of whether Hyland was a public employee, the First Amendment constrained the ability of state officials to deprive Hyland of a valuable governmental benefit as punishment for speaking out on a matter of public concern. We therefore reverse the district court's dismissal of Hyland's First Amendment claim.

A. *Hyland's Status*

The parties belabor the issue of Hyland's status as either a public employee or a volunteer, treating this issue as determinative of Hyland's entitlement to First Amendment protection. In so arguing, the parties fail to recognize the broader constitutional principles animating the Supreme Court's decisions on public employee speech.

The right of public employees to speak on matters of public concern, acknowledged in cases like *Connick v. Myers* is an outgrowth of the constitutional tenet that public officials may not deny or deprive a person of a governmental benefit or privilege on a basis that infringes her or his freedom of speech. *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972) ("For at least a quarter-century, this Court has made clear that . . . [government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech."); *see also Connick*, 461 U.S. at 144, 103 S.Ct. at 1688 (" 'the denial of or placing of conditions upon a

benefit or privilege' " can violate the First Amendment) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963)); *Havekost v. United States Dep't of the Navy*, 925 F.2d 316, 318 (9th Cir.1991) (recognizing the "broad principle that the government may not deny a person a valuable benefit on a basis that infringes his constitutionally protected interests") (quotation omitted).

The cases thus recognize a variety of public benefits, in addition to public employment, which cannot be denied solely because of the recipient's exercise of constitutional rights. *See, e.g., Rutan v. Republican Party*, 497 U.S. 62, ___, 110 S.Ct. 2729, 2736, 111 L.Ed.2d 52 (1990) (promotion or transfer in a government job); *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6, 89 S.Ct. 1322, 1327 n. 6, 22 L.Ed.2d 600 (1969) (welfare benefits); *Sherbert*, 374 U.S. at 404-05, 83 S.Ct. at 1794-95 (unemployment benefits); *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958) (tax exemptions); *Thomas*, 881 F.2d at 829-30 (loss of certain job responsibilities).

We have specifically recognized that the rule of *Perry v. Sindermann* and *Connick v. Myers* applies beyond the employment context. In *Havekost v. United States Dep't of the Navy*, the Navy permitted Havekost to enter the military base and earn tips as a bagger at the commissary. Havekost had no employment contract with the Navy, only "a revocable grant of permission to work for customer tips." 925 F.2d at 317. After Havekost protested the head of the commissary's efforts to regulate baggers, the Navy revoked her permission to enter the base and work. The Ninth Circuit found the *Connick* analysis applicable "even though Havekost was not an employee." *Id.* at 318;

see also Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir.1989) (suspension of petroleum bulk use plant permits violates First Amendment if made in retaliation for speech); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 511 (9th Cir.1988) (exemptions from import duties); *Bernasconi v. Tempe Elementary Sch. Dist. No. 3*, 548 F.2d 857, 860 (9th Cir.) (unwanted transfer constitutes loss of a "valuable governmental benefit"), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 82 (1977).

Thus the relevant question, for purposes of Hyland's First Amendment claim, is not whether Hyland was a public employee, but rather whether the opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny. We hold that it does.

The Supreme Court has instructed that the type of sanction imposed to discourage the exercise of First Amendment rights "need not be particularly great in order to find that rights have been violated." *Elrod v. Burns*, 427 U.S. 347, 359 n. 13, 96 S.Ct. 2673, 2683 n. 13, 49 L.Ed.2d 547 (1976). A person's rights are unconstitutionally infringed "both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Id.*; *see also Rutan*, 497 U.S. at ___ n. 8, 110 S.Ct. at 2737-38 n. 8 ("[T]he First Amendment . . . already protects state employees not only from patronage dismissals but even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.") (quotation omitted). The injury to position or privilege necessary to activate the First Amendment thus need not rise to the

level of lost employment. Retaliatory actions with less momentous consequences, such as loss of a volunteer position, are equally egregious in the eyes of the Constitution because a person is being punished for engaging in protected speech.

The Second Circuit has held that the First Amendment can protect against the loss of a volunteer position. In *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17 (2d Cir.1979), the court held that the dismissal of a volunteer firefighter for complaining about low moral and inadequate training and discipline can violate the First Amendment. *Id.* at 25.[1]

Moreover, as a government volunteer, a person gains valuable experience and education in public administration and can make professional contacts. The parties do not dispute that Hyland hoped to develop expertise and knowledge about juvenile justice by volunteering at the JPD. The opportunity to serve as a volunteer is also important because it provides an individual the satisfaction of making a contribution, or giving something back, to society. Accordingly, volunteer status, no less than business permits and tax exemptions, is a valuable governmental benefit or privilege that may not be denied on the basis of constitutionally protected speech. We thus agree with the Second Circuit that a volunteer position, like other governmental benefits and privileges, can only

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[1] The court ultimately found no constitutional violation because the manner in which Janusaitis expressed himself was incompatible with the need for a close working relationship and *esprit de corps* between firefights. 607 F.2d at 25-26.

be denied in a manner that comports with the First Amendment.

That Hyland had no right, in the first instance, to serve as a volunteer and that he could have been terminated at will does not diminish his First Amendment claim. Indeed, both the Supreme Court and this court have repeatedly and emphatically rejected this argument:

> [T]his Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny in the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which [it] could not command directly. Such interference with constitutional rights is impermissible.

Perry, 408 U.S. at 597, 92 S.Ct. at 2697 (citation and quotation omitted); *see also Rutan*, 497 U.S. at ___, 110 S.Ct. at 2735-36 (following *Perry*, the Court "find[s] the assertion here that the employee petitioners had no legal entitlement to promotion, transfer, or recall beside the point"); *Rankin v. McPherson*, 483 U.S. 378, 383-84, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987) ("Even though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or

for no reason at all, she may *nonetheless be entitled to* reinstatement if she was discharged for exercising her constitutional right to freedom of expression."); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977) ("Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him . . . , he may nonetheless establish a claim to [relief] if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms."); *McKinley v. City of Eloy*, 705 F.2d 1110, 1116 (9th Cir.1983); *accord Keyishian v. Board of Regents*, 385 U.S. 589, 605-06, 87 S.Ct. 675, 685, 17 L.Ed.2d 629 (1967) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.").

In sum, whether Hyland is labelled a public employee or a volunteer is not determinative of whether Hyland stated a claim of First Amendment infringement. Nor is the at-will nature of his position dispositive. The critical question is simply whether Hyland has alleged the loss of a valuable governmental benefit or privilege in retaliation for his speech. We conclude that the loss of a high-level volunteer position, such as that held by Hyland in the JPD, constitutes a deprivation of a valuable governmental benefit or privilege.

B. *Public Concern*

Because Hyland adequately alleged the loss of an important governmental benefit, we must next inquire

whether the speech in question was constitutionally protected from retaliation by the government acting in its capacity as an employer/supervisor. The district court concluded that Hyland's memorandum did not speak to a matter of public concern and thus was not protected. We disagree.

In *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the Supreme Court formulated the "public concern" test in an effort to find a compromise between the rights of public employees to free speech and of the government to regulate its workplace. "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568, 88 S.Ct. at 1734-35. Under *Pickering*, a dismissal from employment or other loss of a governmental benefit as a consequence of speech does not run afoul of the First Amendment unless the speech addresses a matter of public concern. *Id.* at 572-74, 88 S.Ct. at 1736-38; *see also Connick*, 461 U.S. at 146, 103 S.Ct. at 1689. Correspondingly, speech focused solely on internal policy and personnel grievances does not implicate the First Amendment.

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, governmental officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

> . . . *We hold only that when a public* employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. . . . Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

Connick, 461 U.S. at 146-47, 103 S.Ct. at 1690 (citation omitted).

Determining whether speech involves a matter of public concern entails an inquiry into the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S.Ct. at 1690 (footnote omitted); *see also Anderson v. Central Point Sch. Dist. No. 6*, 746 F.2d 505, 507 (9th Cir.1984). If some part of the communication addresses an issue of public concern, the First Amendment's protections are triggered even though other aspects of the communication do not qualify as a public concern. *See Connick*, 461 U.S. at 149, 103 S.Ct. at 1691. Some inaccuracy in the content of the speech must be tolerated. *See Pickering*, 391 U.S. at 570-72, 88 S.Ct. at 1735-37.

We hold that Hyland's memorandum did discuss a matter of public concern. The memorandum exposed abuses, inefficiency, threats to public safety, potential

civil rights violations, and incompetence of public law enforcement officials at Juvenile Hall. Such issues are of vital interest to citizens in evaluating the performance of their government. Moreover, the intersection at Juvenile Hall of the criminal justice system and the special custodial needs of children fuels a heightened concern for openness and public review of governmental operations.

Case law confirms that Hyland's memorandum spoke to a matter of public concern. In *Roth*, we observed that speech regarding "the misuse of public funds, wastefulness, and inefficiency in managing an operating government entities" qualifies as a matter of public concern. 856 F.2d at 1405. Like Hyland, Roth alleged that Veteran's Administration personnel "acted unethically," "mismanaged personnel," "violated safety regulations," and put people "in jeopardy." *Id.* at 1406. We found such issues to be "inherently of interest to the public." *Id.*

Similarly, in *Allen v. Scribner*, 812 F.2d 426 (9th Cir.), *amended*, 828 F.2d 1445 (9th Cir.1987), we held that speech criticizing the "competency of [the Mediterranean Fruit Fly Eradication] Project Management as well as the efficient performance of project duties" constituted a matter of public concern. Indeed, we observed that "[s]uch allegations are arguably the most fundamental sort of first amendment expression, given the first amendment's role in facilitating self-government." *Id.*; *see also McKinley*, 705 F.2d at 1114 (speech addressed to "the competency of the police force is surely a matter of great public concern," as is speech revealing "the interrelationship between city management and its employees," "discipline and morale in the work place," and "an agency's efficient performance of its duties") (quotations omitted); *Janusaitis*, 607

F.2d at 18 (volunteer firefighter's report charging low morale and inadequate training and discipline of firefighters is a matter of public concern).

The context in which the memorandum was drafted and circulated belies the defendants' suggestion that Hyland's speech concerned only an internal personnel dispute. Taking the alleged facts in the light most favorable to Hyland, Hyland's speech was not the by-product of a personal employment dispute. The memorandum did not concern Hyland's dissatisfaction with his own position or on-the-job treatment. *See Roth*, 856 F.2d at 1406. Hyland had no personal occupational stake in the dismissal of La Plante. Nor was Hyland's purpose simply "to gather ammunition for another round of controversy with [his] supervisors." *Connick*, 461 U.S. at 148, 103 S.Ct. at 1690. Hyland's memorandum addressed more than a "work place grievance" – Hyland spoke "in order to bring wrongdoing to light . . . [not] merely to further some purely private interest." *Havekost*, 925 F.2d at 318; *cf. Connick*, 461 U.S. at 148, 103 S.Ct. at 1691 (questionnaire not a matter of public concern because, "if released to the public, [it] would convey no information at all other than the fact that a single employee is upset with the status quo").

While Hyland's memorandum did involve an end-run of his superior, that alone does not suffice to transform the memorandum into a personnel dispute. Pickering's letter to the newspaper was no less a matter of public concern simply because it involved going over the Board of Education and appealing directly to voters. 391 U.S. at 566-69, 88 S.Ct. at 1733-35; *see also Roth*, 856 F.2d at 1404 (criticism "outside the[] ranks" remains a matter of

public concern). To hold otherwise would deter employees from bringing problems and abuses in a governmental office to the attention of the authorities charged with oversight of that office. Some of the most important public employee speech – exposing governmental corruption, wrongdoing, or incompetence – would be left outside the First Amendment's aegis.

The defendants further contend that the staleness of the information contained in the memorandum warrants denying it First Amendment protection. We reject this argument. Admittedly, at the time Hyland's memorandum circulated, troubles at Juvenile Hall had already been exposed to the public by the California Youth Authority. The defendants did not suggest, however, that the detailed discussion of these problems contained in the Hyland memorandum and the identification of La Plante as the root cause of these troubles was already a matter of public record. Furthermore, general public awareness of an issue does not make all further investigation and in-depth discussion of the matter redundant, superfluous, or devoid of public interest. *See Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 411-16, 99 S.Ct. 693, 694-97, 58 L.Ed.2d 619 (1979) (teacher's complaints about race discrimination at school are a matter of public concern, even though school's discriminatory practices had already been exposed when school became the subject of a federal court's desegregation order).

Finally, the defendants suggest that, because Hyland limited his disclosure to the judges and others charged with supervising the administration of Juvenile Hall rather than exposing his complaints to the public as a whole, the content of the memorandum could not be of

concern to the public. The Supreme Court, however, has specifically eschewed such reasoning:

> The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.

Givhan, 439 U.S. at 415-16, 99 S.Ct. at 696-97; *see also Rankin*, 483 U.S. at 386-87 n. 11, 107 S.Ct. at 2899 n. 11 ("The private nature of the statement does not . . . vitiate the status of the statement as addressing a matter of public concern."); *Connick*, 461 U.S. at 149, 103 S.Ct. at 1691 (item on questionnaire circulated only to colleagues still qualifies as a matter of public concern).

Other considerations, moreover, strongly militate in favor of categorizing Hyland's memorandum as a matter of public concern. The memorandum's content addressed a classic topic of public concern – the inept, inefficient, and potentially harmful administration of a governmental entity. Moreover, while Hyland's memorandum was not widely circulated, it was targeted at those public officials most capable of effecting a change in the administration of Juvenile Hall. Bringing problems to the attention of responsible governmental administrators is at least as important a communication for promoting democratic self-government as disclosure to the citizenry as a whole.

C. *Balance*

Our conclusion that Hyland adequately alleged the loss of a valuable governmental benefit or privilege in retaliation for his speech on an issue of public concern does not end the constitutional inquiry. Hyland's discharge could still survive First Amendment scrutiny if the defendants show that Hyland's speech so severely damaged office harmony and working relationships that the government's interest in promoting an effective workplace outweighs Hyland's First Amendment rights. *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899 ("Because McPherson's statement addressed a matter of public concern, . . . we [must] balance McPherson's interest in making her statement against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' ") (quoting *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35); *Connick*, 461 U.S. at 150, 103 S.Ct. at 1692 ("The . . . balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public"); *see also McKinley*, 705 F.2d at 1115.[2]

Application of this balancing test entails a factual inquiry into such matters as whether the speech (i) impairs discipline or control by superiors, (ii) disrupts coworker relations, (iii) erodes a close working relationship premised on personal loyalty and confidentiality, (iv)

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[2] The discharge decision could also be sustained if the defendants proved by a preponderance of the evidence that they would have released Hyland regardless of his speech. *See, e.g., Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. at 576. The defendants, however, do not make such an argument here.

interferes with the speaker's performance of her or his duties, or (v) obstructs the routine operation of the office. *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899; *Connick*, 461 U.S. at 151-52, 103 S.Ct. at 1692-93; *Roth*, 856 F.2d at 1407; *Bernasconi*, 548 F.2d at 861-62. The "manner, time, and place" in which the speech occurred also constitute relevant considerations. *Connick*, 461 U.S. at 152, 103 S.Ct. at 1693.

The nature of the government's burden to show disruption, moreover, varies with the content of the speech. *Connick*, 461 U.S. at 150, 103 S.Ct. at 1692. The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made. *Id.* at 150, 152, 103 S.Ct. at 1692, 1693 ("We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern."); *Roth*, 856 F.2d at 1407; *Allen*, 812 F.2d at 432; *see also Bernasconi*, 548 F.2d at 862 ("[T]he plaintiff's right to speak ought to be protected in consonance with the first amendment's primary concerns.") (quotation omitted). Furthermore, "actual, material and substantial disruption must be demonstrated." *Roth*, 856 F.2d at 1407; *see also Allen*, 812 F.2d at 432 (disruption must be "real, [and] not imagined.") (quoting *McKinley*, 705 F.2d at 1115). Mere allegations of interference with a working relationship cannot "serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views." *McKinley*, 705 F.2d at 1115; *see also Allen*, 812 F.2d at 432.

Determining to what extent Hyland's memorandum disrupted office operations thus involves a factual investigation into the nature of Hyland's tasks, the character of

his relationship with co-workers and especially with his supervisor Sweeney, and the impact of the memorandum on office relations. We have previously recognized that this balancing inquiry cannot be resolved by this court at such an early stage in the proceedings. *Thomas*, 881 F.2d at 832 (balancing inquiry premature where district court dismissed complaint for failure to state a claim); *see also Roth*, 856 F.2d at 1408 (acknowledging factual nature of the inquiry). Consequently, we remand the case to the district court for resolution of the question whether Hyland's memorandum was sufficiently disruptive to justify his dismissal despite the protected content of the speech.

II. *The Due Process Claim*

A. *Property Interest*

The district court held that Hyland failed to state a claim of denial of due process because he lacked an identifiable property interest in his retention as a volunteer. We affirm this aspect of the district court's decision.

Hyland concedes this his expectation of continued volunteer status does not derive either from statutory authority or a written contract.[3] Hyland relies on an alleged oral and implied promise that he could remain a volunteer until receiving a pardon from the Governor.

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[3] California law recognizes the position of a juvenile probation department volunteer. Cal. Welf. & Inst.Code § 842. Nothing in the statute, however, creates any expectation or entitlement to volunteer status.

Hyland's volunteer status, however, does not amount to a constitutionally protected property interest.

> The Supreme Court has explained that: to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it.

Board of Regents, 408 U.S. at 577, 92 S.Ct. at 2709. The Supreme Court went on to outline the possible sources of such property interests:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id; see also Roth, 856 F.2d at 1409 ("Entitlements arise from rules or understandings from independent sources, such as statutes, regulations, and ordinances, or express or implied contracts.") (quotations omitted).

Hyland's allegation of an understanding or implied contract with Sweeney cannot be elevated to the status of a legal entitlement for two reasons. First, an "understanding" must be "mutually explicit" before it can rise to the level of an entitlement. *Roth,* 856 F.2d at 1409. While the alleged understanding or agreement may have reflected Sweeney's and Hyland's expectations, Hyland does not allege that their agreement included an explicit promise that Hyland's volunteer status would not be terminated

prior to the pardon. Hyland thus fails to allege a mutually explicit limitation on the JPD's authority to terminate his volunteer position.

Second, even assuming that Sweeney did expressly promise that Hyland's volunteer service could be terminated when, and only when, Hyland received a pardon, that promise was void as contrary to law. Hyland's property interest must be defined consistently with California law. *Guy v. Mohave County*, 701 F.2d 73, 75 (9th Cir. 1982). Under California law, the terms and conditions of government service are regulated by statute, not by contract. *Williams v. Los Angeles City Dep't of Water & Power*, 130 Cal.App.3d 677, 181 Cal.Rptr. 868, 870 (1982); *see also* Cal. Welf. & Inst. Code § 271 (county civil service laws define tenure of probation department officials and employees). Temporary, non-civil service employees have no property interest in continued employment, according to California law. *Williams*, 181 Cal.Rptr. at 871.

We have held that promises of continued employment made in direct contravention of applicable law are insufficient to create a claim of entitlement for purposes of the Due Process Clause. In *Bollow v. Federal Reserve Bank*, 650 F.2d 1093 (9th Cir. 1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1449, 71 L.Ed.2d 662 (1982), we ruled that a promise of employment security made by a bank officer did not create an enforceable property interest because the Federal Reserve Act of 1913 established the at-will status of employees. *Id.* at 1099. We declared the promise void and concluded that "[a] void contract is clearly insufficient to support a claim of entitlement to government employment." *Id.*; *see also Davis v. Oregon State Univ.*, 591 F.2d 493, 496 (9th Cir.1978) (promise of tenure

insufficient to create property interest in continued employment because inconsistent with University's written regulations governing the grant of tenure).

Any promise Sweeney might have made regarding Hyland's tenure is thus unenforceable because California law expressly forecloses any entitlement to retention of a non-civil service post by persons in Hyland's position. That Hyland might have reasonably thought that Sweeney had the authority to cement his volunteer status does not rescue his claim. Hyland is charged with knowledge of California law. *See Bollow* 650 F.2d at 1100.

In sum, Hyland has no constitutionally cognizable property interest in the perpetuation of his volunteer status. He fails to allege a mutually explicit understanding on termination conditions. Any such promise, moreover, would have been void under California law.

B. *Liberty Interest*

Hyland also argues that his discharge denied him liberty without due process of law because the charges leveled by the defendants unfairly stigmatized him and severely impeded his ability to obtain future employment. We affirm the district court's holding that Hyland's complaint fails to articulate a constitutionally protected liberty interest.

The Fourteenth Amendment's protection against deprivations of liberty encompasses the right of persons " 'to engage in any of the common occupations of life.' " *Board of Regents*, 408 U.S. at 572, 92 S.Ct. at 2707 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67

L.Ed. 1042 (1923)); *see also Bollow*, 650 F.2d at 1100 ("The liberty protected by the due process clause of the fifth and fourteenth amendments encompasses an individual's freedom to work and earn a living.") If, in the course of dismissing an employee, the government takes steps or makes charges that so severely stigmatize the employee that she cannot avail herself of other employment opportunities, a claim for deprivation of liberty will stand. *Board of Regents*, 408 U.S. at 573-74, 92 S.Ct. at 2707-08; *Bollow*, 650 F.2d at 1101 ("To implicate constitutional liberty interests . . . the reasons for dismissal must be sufficiently serious to 'stigmatize' or otherwise burden the individual so that he is not able to take advantage of other employment opportunities").

The stigma imposed must be severe and genuinely debilitating before the discharge can rise to a level of constitutional concern. In other words, the stigma must "seriously damage[] a person's reputation or significantly foreclose[] his freedom to take advantage of other employment opportunities." *Bollow*, 650 F.2d at 1101 (quotation omitted).

Hyland cites Sweeney's statement that Hyland could not work as a peace officer in California, other press statements revealing the circumstances of his discharge, and the allegation that Hyland improperly accessed confidential files as the source of his stigma.[4] These statements are insufficiently egregious to activate the

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[4] Hyland also refers to various threats made by Sweeney and La Plante to prevent Hyland from working in probation ever again. Hyland does not allege, however, that these threats were ever carried out. They thus cannot serve as the predicate for a loss of liberty. *Cf. Bollow*, 650 F.2d at 1101 (reasons for

protections of the Due Process Clause. These are not the types of charges of immorality, or dishonesty that can cripple an individual's ability to earn a living.

> [T]he constitutional need for procedural protection is not strong when the charge (*e.g.*, incompetence) involves a matter which is peculiarly within the scope of employer-employee relations and when the likely results of even a false charge are reduced economic returns and diminished prestige, but not permanent exclusion from, or protracted interruption of, gainful employment within the trade or profession.

Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 366 (9th Cir.1976); *cf. Gray v. Union County Intermediate Educ. Dist.*, 520 F.2d 803, 806 (9th Cir. 1975) (suggestion that employee has difficulty getting along does not deprive individual of liberty because it does not "import serious character defects"). Sweeney and La Plante's charges are unlikely to result in the permanent exclusion or protracted interruption of gainful employment for Hyland. *See Roth*, 856 F.2d at 1411. At most, the charges may make Hyland somewhat less attractive to future employers. This is not enough to implicate the Due Process Clause. *Board of Regents*, 408 U.S. at 574 n. 13, 92 S.Ct. at 2707 n. 13; *see also Roley v. Pierce County Fire Protection Dist. No. 4*, 869 F.2d 491, 495-96 (9th Cir.1989). The federal Constitution is not concerned with every insult hurled in the heat of an employment dispute. Moreover, while not dispositive, the fact that Hyland almost immediately secured a

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discharge that are never publicly disclosed do not infringe liberty interests).

new position is relevant to our assessment of the severity of the defendants' charges against Hyland. *Id.*

Additionally, the protections of the Due Process Clause do not attach to false or damaging accusations alone. The Supreme Court has held that the criticism must be accompanied by the loss or alteration of a right or status recognized by state law before the Due Process Clause is implicated. *Paul v. Davis*, 424 U.S. 693, 708-09, 96 S.Ct. 1155, 1164, 47 L.Ed.2d 405 (1976) (defamation unaccompanied by any tangible loss of a right "vouchsafed . . . by the State" does not deprive an individual of a protected liberty interest); *see also Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 777-78 (9th Cir.1982). Under California law, Hyland has no protected property interest in or legal entitlement to his volunteer position. The loss of his volunteer job thus did not deprive him of a right otherwise protected by state law. "[T]he interest in reputation alone which [Hyland] seeks to vindicate" does not state a claim for loss of liberty cognizable under the Fourteenth Amendment's Due Process Clause. *Paul*, 424 U.S. at 711, 96 S.Ct. at 1165.

Nor do Sweeney's and La Plante's letters and statements to the Governor concerning Hyland's pardon application support a claim of liberty deprivation under the Due Process Clause, for three reasons. First, Hyland does not allege that Sweeney's and La Plante's contacts actually caused the Governor to deny the pardon.

Second, Sweeney's and La Plante's statements to the Governor were not publicly disclosed, according to the allegations of the complaint. *See Finkelstein v. Bergna*, 924

F.2d 1449, 1452 (9th Cir.) *cert. denied,* ___ U.S. ___, 112 S.Ct. 75, 116, L.Ed.2d 49 (1991).

Third, the grant of a pardon is a discretionary act. Hyland has no right or entitlement to the pardon under state law. As noted earlier, calumny unaccompanied by the loss or alteration of a right or status recognized by state law does not constitute a deprivation of liberty, within the meaning of the Fourteenth Amendment's Due Process Clause. *Id.; see also Paul,* 424 U.S. at 711, 712, 96 S.Ct. at 1165, 1166.

In sum, we affirm the district court's determination that Hyland's complaint failed to state a claim for the deprivation of a constitutionally protected property or liberty interest.

III. *Attorney's Fees*

Both Hyland and the defendants seek an award of attorney's fees on appeal pursuant to 42 U.S.C. § 1988. This court is authorized to award attorney's fees to the prevailing party for the prosecution of an appeal in an action brought under 42 U.S.C. § 1983. 42 U.S.C. § 1988; *see Herrington v. County of Sonoma,* 883 F.2d 739, 742-43 (9th Cir.1989). We deny Hyland's request for fees, however, because any determination of Hyland's status as a "prevailing party" would be premature at this stage. *Richardson v. Penfold,* 900 F.2d 116, 118-19 (7th Cir.1990); *see also Mantolete v. Bolger,* 791 F.2d 784, 786 (9th Cir. 1986).

The defendants' request for attorney's fees is also denied. Civil rights defendants, unlike plaintiffs, may

obtain attorney's fees under 42 U.S.C. § 1988 only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978) (standard for awarding fees to defendants in Title VII action); *see also Hughes v. Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980) (adopting *Christiansburg* standard for purposes of 42 U.S.C. § 1988); *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2, 103 S.Ct. 1933, 1937 n.2, 76 L.Ed.2d 40 (1983); *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 619-20 (9th Cir.1987). Neither Hyland's First Amendment nor his Fourteenth Amendment claim is frivolous or unreasonable.

CONCLUSION

We reverse the district court's dismissal of Hyland's First Amendment claim. By alleging the loss of a valuable governmental benefit as retaliation for constitutionally protected speech on a matter of public concern, Hyland stated a claim for relief under 42 U.S.C. § 1983. We remand, however, for the factual determination of whether the defendants' need to maintain an efficient and effective workplace justified Hyland's dismissal.

We also affirm the dismissal of Hyland's Fourteenth Amendment claim. Hyland failed to allege a constitutionally cognizable deprivation of property or liberty.[5]

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[5] This dismissal is without prejudice. If granted leave by the district court, Fed.R.Civ.P. 15(a), Hyland might well be able to amend the complaint to state the loss of an interest sufficient to activate the protections of the Due Process Clause.

The decision of the district court is AFFIRMED-IN-PART and REVERSED-IN-PART and the case is REMANDED for further proceedings consistent with this opinion. Each party shall bear its own costs.

PREGERSON, Circuit Judge,

Concurring:

I concur in the majority opinion with one exception. I do not agree that the charge that Hyland improperly accessed confidential files is insufficiently egregious to activate the protections of the Due Process Clause. The majority states that the charges leveled against Hyland are not within the types of charges of immorality or dishonesty which infringe the liberty interest. *Ante,* at 1141-1143. I disagree.

The Supreme Court and our court have distinguished between charges that challenge an individual's good name, reputation, honor and integrity and charges of incompetence or inability to get along with coworkers. The former infringe the liberty interest while the latter do not. *See Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Bollow v. Federal Reserve Bank of San Francisco,* 650 F.2d 1093 (9th Cir.1981), *cert. denied,* 455 U.S. 948, 102 S.Ct. 1449, 71 L.Ed.2d 662 (1982); *Stretten v. Wadsworth Veterans Hospital,* 537 F.2d 361 (9th Cir.1976); *Gray v. Union County Intermediate Education District,*520 F.2d 803 (9th Cir.1975); *Jablon v. Trustees of California State Colleges,* 482 F.2d 997 (9th Cir.1973), *cert. denied,* 414 U.S. 1163, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974).

In *Roth,* Wisconsin State University–Oshkosh did not rehire Roth and did not give any reasons for its

decision. The Court held that there was "no suggestion whatever that [Roth's] good name, reputation, honor, or integrity [were] at stake." *Roth*, 408 U.S. at 573, 92 S.Ct. at 2707 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971)).

In *Bollow*, Federal Reserve Bank management dismissed Bollow because he "was involved in an altercation with a Bank secretary during which he allegedly shouted profanities and used abusive language" and because of "his inability to get along with other Bank employees, as evidenced by the alleged shouting altercation and other similar incidents involving Bollow." *Bollow*, 650 F.2d at 1096. We held in *Bollow* that "inability to get along charges" do not infringe liberty interests.

In *Stretten*, Wadsworth Veterans Hospital terminated Dr. Stretten because of his "inability to perform satisfactorily as a pathology resident, including an unwillingness or inability to deal with his coworkers in a professional manner." *Stretten*, 537 F.2d at 366. As a result, we found no infringement of liberty and no deprivation of due process.

In *Gray*, the County Intermediate Education District chose not to renew Gray's employment contract. The reasons given included "student and parent problems," "incompetence," "hostility toward authority," and "aggresive behavior." *Gray*, 520 F.2d at 806. We held that "personality differences or difficulty with others" do not "import serious character defects" and "are simply not the kinds of accusations which warrant a hearing. . . ." *Gray*, 520 F.2d at 806.

Finally, in *Jablon*, San Francisco State College decided not to renew Professor Jablon's employment contract for the following year because his academic performance was deemed inadequate. We concluded that the reasons given for nonrenewal "all related to [Jablon's] academic performance at the College, which did not deem him to be a good enough overall teacher and scholar to merit retention." *Jablon*, 482 F.2d at 1000. Significantly, we found that "the College did not attack his honesty or integrity." *Jablon*, 482 F.2d at 1000.

In this case, the accusation that Hyland improperly accessed confidential files impinges on his moral character. The cases the majority relies upon, however, all deal with charges of incompetence or inability to get along with coworkers. Accordingly, I believe that the charges against Hyland are sufficient to implicate the Due Process Clause.

I concur in the result because Hyland's complaint as currently framed is deficient. First, Hyland has not alleged that he suffered the loss of some right or interest protected by state law as required by *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Second, Hyland has not alleged that the defendants' actions caused the termination of his employment with the National Center on Institutions and Alternatives. Finally, Hyland has not alleged that the defendants' actions caused the Governor to deny his pardon or that their statements to the Governor were publicly disclosed. Of course, if given leave by the district court, Hyland is not precluded from amending his complaint to cure these deficiencies.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LANRIC HYLAND, Plaintiff, vs. ROY L. WONDER, Supervising Judge, Juvenile Court, individually and in his official capacity, et al., Defendants.	No. C 90 0646 MHP ORDER DISMISSING PLAINTIFF'S COMPLAINT (Filed Oct. 9, 1990)

ENTERED IN CIVIL DOCKET 10/10, 1990

The Court, after reviewing the first amended complaint, and the written arguments filed in the above-entitled matter finds as follows:

That their [sic] is no 42 U.S.C. § 1983 claim stated on either a property interest or liberty interest in that the plaintiff's employment relationship was one that has been routinely rejected by the Federal Court as a protected property right of employment.

Furthermore, the nature of the freedom of speech claims are clearly within the case of *Connick v. Meyers* 46 U.S. 148 (1983) in that the speech is not protected such as to give rise to a 42 U.S.C. § 1983 claim.

The 42 U.S.C. § 1985 claim also has no merit in that plaintiff has not established that he is a member of any particular race or suspect class that is protected under § 1985. Furthermore, under *Deretich v. Office of Administrative Hearings* 798 F.2d 1147 (1986), cases involving private employment disputes are not protected under 42 U.S.C. § 1985.

Therefore, it is hereby ordered that the federal claims in plaintiff's first amended complaint are dismissed.

It is further ordered that the entire complaint is dismissed for lack of subject-matter jurisdiction pursuant to 12(b)(1) of the Federal Code of Civil Procedure. The remaining state claims are therefore dismissed for lack of pendant jurisdiction but without prejudice.

DATED: Oct. 9, 1990

/s/ Marilyn Hall Patel
HON. MARILYN HALL PATEL
Judge of the Federal Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LANRIC HYLAND, PLAINTIFF, VS. ROY L. WONDER, SUPERVISING JUDGE, JUVENILE COURT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL., DEFENDANTS.	NO. C-90-0646-MHP SAN FRANCISCO, CALIFORNIA SEPTEMBER 10, 1990

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
MARILYN HALL PATEL, JUDGE

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REPORTED BY:

CARL R. PLINE
OFFICIAL COURT REPORTER

[p. 2] MONDAY, SEPTEMBER 10, 1990

1:23 P.M., O'CLOCK

THE CLERK: CIVIL ACTION: 90-646 HYLAND VERSUS WONDER, ET AL., FOR MOTIONS TO DISMISS.

COUNSEL, YOUR APPEARANCES, PLEASE.

AND FOR STATUS.

MS. GIORGI: GOOD AFTERNOON, YOUR HONOR.

MY NAME IS LORETTA GIORGI, DEPUTY CITY ATTORNEY,

REPRESENTING DEFENDANTS.

THE COURT: GOOD AFTERNOON.

MR. HYLAND: GOOD AFTERNOON –

MS. CHANDLER: GOOD AFTERNOON, YOUR HONOR.

SHARON CHANDLER ON BEHALF OF DEFENDANT JUDGES, WONDER AND HANLON.

THE COURT: GOOD AFTERNOON.

MR. HYLAND: GOOD AFTERNOON, YOUR HONOR.

LANRIC HYLAND, APPEARING IN PRO SE.

THE COURT: GOOD AFTERNOON.

I'M SORRY YOU HAD TO WAIT SO LONG. I DID NOT EXPECT THAT SOME OF THE – A COUPLE OF THOSE EARLIER CASES WOULD TAKE AS LONG AS THEY DID.

AS I UNDERSTAND IT, THERE IS SOME AGREEMENT TO DISMISS CERTAIN OF THE DEFENDANTS. AND SO AS TO THOSE THEN WE WON'T BE CONCERNED; AND WE'LL JUST DEAL WITH THOSE WHO HAVE A MOTION PENDING, AND AGAINST WHICH THERE'S BEEN NO DISMISSAL.

[p. 3] CORRECT?

MR. HYLAND: THAT'S CORRECT, YOUR HONOR.

AND ON THE ASSURANCE FROM MS. GIORGI THAT THE DISCOVERY AS TO THOSE PEOPLE WOULD BE TREATED . . . IN A NORMAL FASHION, I WOULD MOVE AT THIS TIME THAT THEY BE DISMISSED.

THE COURT: OKAY. NOW, I'LL DEAL WITH THAT WITH A SEPARATE ORDER, SO WE CAN GO ON. BECAUSE THE HOUR IS LATE.

THE CRITICAL THING THAT I HAVE TO LOOK AT HERE IS WHAT GIVES THE FEDERAL COURT JURISDICTION. AND THAT IS ESSENTIALLY BASED UPON OR POSITED UPON THE 1983 AND THE 1985 CLAIMS.

AND I GUESS AT – FIRST OF ALL, WITH RESPECT TO THIS NOTION OF – UNDER 1983, AS I UNDERSTAND IT, THERE IS A CONTENTION THAT THERE IS A – A FREEDOM OF SPEECH ISSUE; NAMELY, THAT THERE WAS TERMINATION OR – OR TREATMENT THAT WAS IN RETALIATION FOR SPEAKING OUT, OR WHATEVER. AND – AND THAT ALSO THERE IS A – SOME KIND OF CONSTITUTIONALLY PROTECTED PROPERTY RIGHT.

IS THAT CORRECT?

MR. HYLAND: YES, YOUR HONOR.

THE COURT: AND THEN THERE'S A 1985 CLAIM.

MR. HYLAND: YES, YOUR HONOR.

THE COURT: ESSENTIALLY BASED UPON THE SAME KIND OF THING.

WELL . . . WERE YOU EVER ON THE PAYROLL OF THE CITY?

MR. HYLAND: YES, YOUR HONOR.

[p. 4] THE COURT: YOU WERE ESSENTIALLY IN A FUNCTION AS A VOLUNTEER.

MR. HYLAND: NO, I WAS – I WAS ON THE PAYROLL FOR THE PERIOD OF TIME FROM MARCH . . . SOMETHING TO JUNE 30TH.

AND I WAS ALSO – WELL, THAT'S WHEN I WAS – DURING THAT PERIOD OF TIME IS WHEN I WAS ACTUALLY AN NSE – NON-CIVIL SERVICE TEMPORARY EMPLOYEE PAID WITH CITY FUNDS.

THE COURT: UH-HUH.

MR. HYLAND: PRIOR TO –

THE COURT: SO IT WAS A TEMPORARY EMPLOYEE.

MR. HYLAND: AS A TEMPORARY EMPLOYEE.

THE COURT: UH-HUH.

WELL, WHAT CONSTITUTIONALLY PROTECTED RIGHT IS THERE OF EITHER A VOLUNTEER OR A TEMPORARY EMPLOYEE THAT RISES TO THE LEVEL OF A FEDERAL RIGHT?

MR. HYLAND: WELL, THIS IS A BIT OF A STRANGE CASE. BUT THE – THE CONTRACT, IF YOU WILL, WHICH WAS – WHICH WAS DRAWN BETWEEN MYSELF AND THE THEN SUPERVISING JUDGE OF THE JUVENILE COURT, DAN WEINSTEIN, AND MR. SWEENEY, WAS THAT THEY INDUCED ME TO COME TO WORK FULL TIME FOR THEM UNTIL WE COULD GET A POSITION.

AND WHAT THEY CONTRACTED TO DO WAS TO KEEP ME WORKING, KEEP ME EMPLOYED . . . AS – AS THEY COULD PUT THEIR HANDS ON SOME MONEY.

SO THE FIRST MONEY THEY PUT THEIR HANDS ON WAS THE SAN [p. 5] FRANCISCO FOUNDATION

MONEY. AND THAT IS WHAT PAID ME FROM OCTOBER THROUGH JANUARY.

THEN THERE WAS A PERIOD OF TIME WHERE THERE WASN'T ANY MONEY. AND THEN AN EMPLOYEE QUIT, AND MR. SWEENEY WAS ABLE TO FIND MORE MONEY.

MY CONTENTION IS THAT WE – AND IN FACT WE WERE IN THE PROCESS OF GETTING ANOTHER GRANT, MR. SWEENEY WAS. AND – AND THAT WOULD HAVE CONTINUED ME ON AS – AS AN EXECUTIVE ASSISTANT; AND THIS PROCESS INTERRUPTED THE FLOW OF THAT EMPLOYMENT.

THE COURT: WELL, DOESN'T JUST THE VERY NATURE OF THAT . . . TENUOUS KIND OF SITUATION, SUGGEST THAT WHEN YOU LOOK AT THE FEDERAL CASES, AND WHAT RISES TO THE LEVEL OF A FEDERALLY PROTECTED RIGHT – NOT SOME RIGHT THAT MAY EXIST IN STATE LAW, IN SOME CONTRACT THEORY, OR WHATEVER – THAT – THAT INDEED THERE ISN'T A FEDERALLY PROTECTED PROPERTY RIGHT IN SUCH EMPLOYMENT?

MR. HYLAND: WELL –

THE COURT: I MEAN IS THERE ANY AUTHORITY FOR A PROPERTY RIGHT IN SUCH EMPLOYMENT?

MR. HYLAND: I WOULD – I WOULD THINK, YOUR HONOR, THAT THERE'S BOTH A PROPERTY AND A LIBERTY INTEREST INVOLVED.

AND THE UNIQUENESS, AND WHAT DISTINGUISHES THIS FROM THE CASES THAT DEFENSE

ARGUES, IS THAT I WOULDN'T ARGUE THAT FOR- . . . ALMOST ANY REASON HE CHOSE MR. SWEENEY COULD HAVE ENDED THE RELATIONSHIP, AND THAT WOULD HAVE BEEN THAT.

[p. 6] WHAT I AM ALLEGING IS THAT HE – IT IS IMPERMISSIBLE FOR HIM TO END IT IN VIOLATION OF MY FIRST AMENDMENT RIGHTS. WHATEVER THE RELATIONSHIP WAS, HE STEPPED OVER THE BOUNDS WHEN HE DID SO IN VIOLATION OF FIRST AMENDMENT RIGHTS.

THE COURT: OKAY.

WELL, WHAT – WHAT DID YOU SPEAK OUT ABOUT?

MR. HYLAND: I SPOKE OUT –

THE COURT: THAT –

MR. HYLAND: I'M SORRY.

THE COURT: – GIVE RISES TO THIS. . . .

MR. HYLAND: I SPOKE OUT ABOUT – I – I ADDRESSED AN EIGHT-PAGE MEMO TO THE SUPERVISING JUDGE OF THE COURT, TO THE PRESIDING JUDGE OF THE COURT, AND TO THE IMMEDIATE PAST SUPERVISING JUDGE, DETAILING FOR THE FIRST TIME . . . IN THE DETAIL WHICH I UNCOVERED – BECAUSE MR. SWEENEY GAVE ME THE ASSIGNMENT TO DO THE PERFORMANCE EVALUATION OF THE DIRECTOR OF JUVENILE HALL – THE ABSOLUTE TOTAL INABILITY OF THE MAN TO RUN THE INSTITUTION.

AND PRIOR TO THAT TIME THOSE FACTS WERE KNOWN TO NOBODY. AND MR. SWEENEY WAS NOT GOING TO MAKE THOSE FACTS AVAILABLE. AND SO I MADE THEM AVAILABLE.

THE MINUTE THAT I EVEN – I MEAN, HE DIDN'T EVEN READ THE MEMO. HE JUST SHUT ME OFF WHEN HE SAW THAT I WAS GOING TO ADDRESS A MEMO TO HIS BOSS, TO THE SUPERVISING JUDGE OF THE COURT, AND TO THE PRESIDING JUDGE OF THE SUPERIOR COURT, WHICH [p. 7] HAS THE RESPONSIBILITY –

THE COURT: HAVE YOU READ THE CASE OF CONNICK V. MYERS, (PHONETIC)? THE SUPREME COURT DECISION?

MR. HYLAND: I – I DON'T THINK SO. IT DOESN'T IMMEDIATELY SPRING TO MIND.

THE COURT: WELL . . . THAT'S WHAT CONTROLS HERE. IT'S JUST THAT KIND OF CONDUCT WHICH THE SUPREME COURT SAYS IS NOT PROTECTED.

AND THEY DRAW A DISTINCTION BETWEEN COMPLAINING ABOUT INTERNAL ADMINISTRATIVE MATTERS, INCLUDING, YOU KNOW, COMPLETE INCOMPETENCY OF SOMEONE WHO IS RUNNING A DEPARTMENT OR WHATEVER, TO THE KIND OF THINGS THAT ARE MORE OF A PUBLIC INTEREST WHISTLE BLOWING, SUCH AS, FOR EXAMPLE . . . SO AND SO IS BEATING UP THE KIDS AT THE JUVENILE FACILITY, AND . . . NO ONE IS TAKING ANY ACTION,

AND IS ALLOWING IT TO OCCUR, AND SO FORTH, WHERE OF COURSE THERE IS A PUBLIC INTEREST.

AND THEY DELINEATE VERY CLEARLY THAT EVEN IN A PUBLIC AGENCY COMPLAINTS ABOUT THE INTERNAL OPERATIONS AND . . . OF – NO MATTER HOW BAD IT MAY BE – OF A DEPARTMENT REALLY ARE MATTERS THAT ARE NOT . . . PRIVILEGED UNDER THIS FIRST AMENDMENT RIGHT.

IT SEEMS TO ME –

MR. HYLAND: BUT THAT'S SPECIFICALLY WHAT I WAS NOT DOING, YOUR HONOR. I MEAN, THERE WERE – THERE WERE –

THE COURT: BUT THE FACTS YOU GAVE ME ARE IN FACT TO THE CONTRARY.

[p. 8] MR. HYLAND: OH, NO. I – I ALLEGE THAT THERE WERE THIRTY ESCAPES IN A MATTER OF SIX MONTHS –

THE COURT: UH-HUH.

MR. HYLAND: – A DIRECT THREAT TO PUBLIC SAFETY.

THAT THE WORKING CONDITIONS INSIDE THE INSTITUTION WERE AN IMMEDIATE AND CONTINUING THREAT TO EMPLOYEE SAFETY, AS WELL AS TO THE YOUTH.

THAT THERE WAS – THERE WAS VERY DEFINITELY SOMETHING OTHER THAN MR. LA PLANTE'S PERSONAL INCOMPETENCE WHICH WAS WHAT I WAS ALLEGING.

BUT IF WE COULDN'T STEP BEYOND MR. LA PLANTE, THEN THOSE OTHER MATTERS OF PUBLIC CONCERN COULDN'T BE ADDRESSED. AND MR. SWEENEY WAS REFUSING TO ADDRESS THEM.

AND MEANTIME . . . THERE'S ALL THESE ESCAPES; THERE'S A SUBSTANTIAL INCREASE IN EMPLOYEE INJURY AND TIME OFF WORK; AND THERE'S A SUBSTANTIAL INCREASE IN THE NUMBER OF DISCIPLINES INSIDE THE INSTITUTION, AND THE RESULTANT INJURIES TO YOUTH AS A RESULT OF THE – OF THE ABSOLUTE TURMOIL IN THE INSTITUTION.

THE COURT: DO YOU WISH TO RESPOND?

MS. GIORGI: YES, YOUR HONOR.

FIRST OF ALL, I WANT TO RESPOND IN TERMS OF MR. HYLAND'S STATEMENT THAT MR. SWEENEY NEVER READ THE MEMO.

I BELIEVE THAT – THAT THAT JUST GOES TO SHOW THAT THERE WAS NOT AN INTENT TO VIOLATE ANY FREE SPEECH RIGHTS OF MR. HYLAND, BUT IN FACT THE IMPROPRIETY OF MR. HYLAND, WHO IS MERELY [p. 9] A VOLUNTEER AT THAT POINT, IN EXPRESSING VIEWS OF LA PLANTE'S SUPPOSED INCOMPETENCE TO THE SUPERIOR COURT.

I BELIEVE THAT WAS MORE OF MR. SWEENEY'S INTENT BEHIND FINALLY TERMINATING HIS VOLUNTEER STATUS, RATHER THAN WHAT THE SPEECH ITSELF WAS.

I ALSO AGREE WITH THE COURT'S ANALYSIS OF CONNICK V. MYERS IN TERMS OF THIS CASE. THAT

THE MEMO THAT MR. HYLAND DRAFTED, AS MANY SUBSEQUENT MEMOS SHOW, WAS DIRECTLY SPEAKING TO MR. LA PLANTE'S INCOMPETENCE.

OTHER – YOU KNOW, IT IS TRUE THAT HE DID SPEAK TO THOSE ISSUES WHICH HAVE BEEN KNOWN TO THE PUBLIC AND KNOWN TO THE SUPERIOR COURT FOR SOMETIME [SIC] OF PROBLEMS WITHIN THE JUVENILE HALL, BUT THEY DIRECTLY RESPONDED TO THE FACT THAT MR. LA PLANTE WAS NOT CORRECTING – TAKING CORRECTIVE ACTION, OR NOT DOING WHAT MR. HYLAND FELT WAS NECESSARY TO – TO DO.

AND I BELIEVE THAT CONNICK V. MYERS IS ON POINT IN TERMS OF THE FACT IT IS NOT PROTECTED SPEECH, PER SE.

THE COURT: WELL, I – I'VE REVIEWED THE COMPLAINT – AND THEN THERE WAS AN AMENDED COMPLAINT THAT WAS FILED AS WELL – VERY CAREFULLY, AND – IN SEARCHING OUT WHETHER OR NOT THERE ARE FEDERAL CLAIMS.

AND I'M – I'M GOING TO DO THE FOLLOWING – AND I'LL ASK YOU TO PREPARE AN ORDER.

IT'S MY CONCLUSION, AFTER REVIEWING THEM, THAT THERE IS – THERE'S NO 1983 CLAIM STATED ON EITHER A PROPERTY INTEREST [p. 10] OR . . . CHARACTERIZED AS A LIBERTY INTEREST BASIS FOR THE REASONS I'VE INDICATED.

FIRST OF ALL, THE NATURE OF THE EMPLOYMENT HERE, TO THE EXTENT THERE WAS EMPLOYMENT, OR THE NATURE OF THE RELATIONSHIP, WAS

NOT ONE THAT HAS BEEN RECOGNIZED BY - BY COURTS ROUTINELY - IN FACT, ROUTINELY REJECTED - AS A RPOTECTED PROPERTY RIGHT OF EMPLOYMENT.

AND THOSE CASES THAT HAVE RECOGNIZED SUCH ARE ONES WHERE THERE'S A - JUST AN EXTRAORDINARY AMOUNT OF PROCEDURAL DUE PROCESS SURROUNDING THE - THE ABILITY TO TERMINATE SOMEONE, OR TO . . . TAKE ANY ACTION WITH REGARD TO THEIR EMPLOYMENT.

THE NATURE OF THE FREE SPEECH CLAIMS HERE ARE CLEARLY WITHIN CONNICK V. MYERS, AS THEY ARE ALLEGED IN THIS - IN THE COMPLAINTS THAT I'VE REVIEWED, AND ARE THE KIND OF CLAIMS THAT ARE NOT PROTECTED SUCH AS TO GIVE RISE TO A 1983 CLAIM IF THERE IS A TERMINATION OR SOME OTHER ACTION TAKEN BASED UPON . . . COMPLAINTS OR STATEMENTS THAT ARE MADE OF THE NATURE THAT ARE INVOLVED HERE.

WITH RESPECT TO THE 1985 CLAIM, THAT CLEARLY MUST BE DISMISSED FOR THE FOLLOWING REASONS.

THE SUPREME COURT HAS MADE IT CLEAR THAT IT MUST BE BASED ON CLASS BASED OR RACIAL ANIMUS. AND THE PLAINTIFF HAS NOT ESTABLISHED THAT THERE IS ANY - THAT HE IS THE MEMBER OF ANY CLASS - PARTICULAR RACE OR SUSPECT CLASS THAT IS PROTECTED UNDER 1985.

[p. 11] THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS V. SCOTT, DECIDED BY THE

SUPREME COURT IN 1983, MADE IT CLEAR THAT FOR EXAMPLE IT DOESN'T APPLY TO UNION ACTIVITIES AGAINST NONUNION EMPLOYEES.

IT ESSENTIALLY RELATES TO RACE BASED TYPE OF CLAIMS, THE CLAIMS WHERE THE PLAINTIFF IS A MEMBER OF A DISCRETE AND INSULAR MINORITY OR SUSPECT CLASS. THAT'S BEEN SO TREATED TRADITIONALLY BY - BY THE FEDERAL COURTS.

AND CASES INVOLVING PRIVATE EMPLOYMENT DISPUTES, AS - AS THE EIGHTH CIRCUIT HAS SAID IN DERETICH, D-E-R-E-T-I-C-H, V. OFFICE OF ADMINISTRATIVE HEARINGS, 798 F.2D 1147, ARE NOT PROTECTED UNDER SECTION 1985.

I'M GOING TO DISMISS THE FEDERAL CLAIMS, AND DISMISS THE ENTIRE ACTION, BUT AS TO THE STATE CLAIMS, THEY ARE DISMISSED WITHOUT PREJUDICE TO THEIR RENEWAL IN STATE COURT. BECAUSE I'M NOT GOING TO REACH THOSE CLAIMS.

IF PLAINTIFF WISHES TO PROCEED ON THOSE IN - IN STATE COURT, HE CAN. BECAUSE HE'S MADE - YOU KNOW, IT'S A LENGTHY COMPLAINT, AND HE'S MADE A NUMBER OF CLAIMS UNDER - UNDER STATE LAW, AND WITHOUT THE 1983 AND 1985 CLAIMS THIS COURT DOESN'T HAVE JURISDICTION OVER THOSE.

MR. HYLAND: A QUESTION, YOUR HONOR.

DID YOU REACH THE ACTIONS OF JUNE 13TH, OR JUST THE FEBRUARY 24TH?

THE COURT: I'M REACHING THE ENTIRE COMPLAINT - [p. 12] COMPLAINTS. THE MOST RECENT COMPLAINT AS AMENDED, INDEED.

MR. HYLAND: DOES YOUR HONOR - I MEAN, I DIDN'T HEAR ANYTHING -

THE COURT: I DIDN'T PARSE THOSE OUT. BUT THERE'S NOTHING IN THE COMPLAINT THAT SUPPORTS EITHER A 1983 OR A 1985 ACTION.

NOW, THAT - THAT'S NOT WITHOUT -

MR. HYLAND: EVEN MY NCIA EMPLOYMENT, WHERE THE JUDGE CALLED THE EMPLOYER IN, AND HAD -

THE COURT: YOU MAY HAVE A STATE - YOU MAY HAVE A STATE CLAIM, BUT YOU DO NOT HAVE A FEDERAL CLAIM.

AND WOULD YOU PREPARE AN ORDER, PLEASE.

MS. GIORGI: WE WILL, YOUR HONOR.

THE COURT: OKAY.

THANK YOU.

MS. GIORGI: THANK YOU, YOUR HONOR.

MR. HYLAND: THANK YOU, YOUR HONOR.

THE CLERK: COURT IS IN RECESS.

(WHEREUPON THESE PROCEEDINGS CONCLUDED AT 1:38 P.M.)

CERTIFICATE OF REPORTER

I, WE, THE UNDERSIGNED OFFICIAL REPORTERS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 12 INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY, OUR, SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER TO THE PROCEEDINGS HEREINBEFORE ENTITLED AND REDUCED TO TRANSCRIPTION TO THE BEST OF MY, OUR, ABILITY.

/S/ Carl R. Pline
CARL R. PLINE

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LANRIC HYLAND, Plaintiff-Appellant, v. ROY L. WONDER, Supervising Judge, Juvenile Court, individually and in his official capacity, et alia; SUPERIOR COURT FOR THE CITY AND COUNTY OF SAN FRANCISCO; DENNIS SWEENEY; FRED JORDAN; SAN FRANCISCO JUVENILE PROBATION COMMISSION; DIANE LAPLANTE; CITY AND COUNTY OF SAN FRANCISCO, Defendants-Appellees, and STEPHEN LA PLANTE, Defendant.	No. 90-16796 DC No. CV-90-00646-MHP ORDER (Filed Dec. 10, 1992)

Before: TANG, PREGERSON and BOOCHEVER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 92-1478

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROY L. WONDER, *et al.*,

Petitioners,

v.

LANRIC HYLAND,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 12, 1993

Washington, D.C. • THIEL PRESS • (202) 328-3286

QUESTION PRESENTED

Does the First Amendment permit a City to fire a full time employee who is temporarily in a non-pay status, and thereafter deprive him of his private employment and otherwise retaliate against him, because of his speech on a matter of public concern?

TABLE OF CONTENTS

		Page
STATEMENT OF THE CASE		1
REASONS FOR DENYING THE WRIT		5
I.	THE COURT OF APPEALS' FIRST AMENDMENT RULING IS SUPPORTED BY SETTLED PRINCIPLES AND RAISES NO ISSUES WARRANTING REVIEW.	5
II.	THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS AND IS OTHERWISE UNWORTHY OF REVIEW.	9
CONCLUSION		11

TABLE OF AUTHORITIES

Cases: Page

Connick v. Myers, 461 U.S. 138 (1983) . . . . . Passim

Carey v. Brown, 447 U.S. 455 (1980) 7

Downtown Auto Parks, Inc. v. City of Milwaukee, 938 F.2d 705 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 640 (1991) 9,10

Elrod v. Burns, 427 U.S. 347 (1976) 7

Gonzalez v. Benavides, 712 F.2d 142 (5th Cir. 1983) . . 11

Hall v. Ford, 856 F.2d 255 (D.C.Cir. 1988) 11

Havekost v. United States Department of the Navy, 925 F.2d 316 (9th Cir. 1991) 8

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) . . . 7

Janusaitis v. Middlebury Volunteer Fire Dep't., 607 F.2d 17 (2nd Cir. 1979) 10

LaFalce v. Houston, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984) 9

Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977) 6

Perry v. Sinderman, 408 U.S. 593 (1972) 7

Pickering v. Board of Education, 391 U.S. 563 (1968) 4,10

Rankin v. McPherson, 483 U.S. 378 (1987) 6

Rutan v. Republican Party of Illinois,
497 U.S. 62 (1990) 7,10

Rutan v. Republican Party of Illinois, 868 F.2d 943
(7th Cir. 1989) *(in banc), reversed on other grounds*,
497 U.S. 62 (1990) 9

Shelton v. Tucker, 364 U.S. 479 (1960) 7

Versarge v. Township of Clinton New Jersey,
984 F.2d 1359 (3rd Cir. 1993) 10

Statutes:

28 U.S.C. § 1331 4

28 U.S.C. § 1343 4

IN THE
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ROY L. WONDER, ET AL.,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

1. *Facts.* After his conviction of a felony in 1964 and subsequent release from prison, respondent Lanric Hyland became an expert in the administration of criminal justice (Pet.App. 3). In May 1987 Hyland began work under petitioner Dennis Sweeney, the Chief Probation Officer of the San Francisco Juvenile Probation Department (JPD). Hyland promised to work full time and petitioners promised to make their best efforts to obtain compensation for him. The agreement was to last until Hyland could obtain a pardon from the Governor of California and thus be appointed to a permanent position in the JPD (Pet.App. 3-

4; E.R 9).[1]

Hyland was issued a department identification card designating him "Special Assistant to the Chief Probation Officer". He had a desk, a phone, and a set of keys. For work performed between October and December 1987 petitioners paid Hyland $10,500.00 from the Youth Guidance Center Improvement Committee, a non-profit corporation controlled by the Juvenile Court. For work performed from January to June 1988 Hyland was paid $9,400.19 by the City and County of San Francisco as a non-civil service employee (E.R. 9-10).

Through February 1989 petitioners considered Hyland an exemplary employee (E.R. 8). Three judges of the Superior Court wrote the Governor recommending a pardon and noting petitioner's contributions to the criminal justice system (E.R. 57-58). Sweeney and his subordinate, petitioner Dennis LaPlante who was the Director of Juvenile Hall, wrote similar recommendations, and commended Hyland's work for the JPD (E.R. 59-60). The Board of Prison Terms and the California Supreme Court unanimously recommended a pardon, and the pardon application was under consideration by the Governor (E.R. 79, 73).

In February 1989, following threatened legal action against the City of San Francisco by the United States Department of Justice and other entities over conditions at

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[1] "E.R." refers to the Excerpts of Record filed in the Court of Appeals.

Juvenile Hall, and findings by the California Youth Authority that Juvenile Hall failed to meet minimal standards required by state law (E.R. 50, 10-11), Hyland drafted an eight page memorandum to three Superior Court judges addressing various shortcomings at Juvenile Hall and attributing them to LaPlante's deficient performance. The memorandum did not discuss any of Hyland's personal employment interests or status (E.R. 49-56). Immediately upon receipt of the memorandum addressed to the judges, Sweeney terminated Hyland because he had "no right to do this" (Pet.App. 4-5).

In March 1989 Sweeney called a newspaper reporter to retaliate against Hyland and disclosed his prior felony conviction (E.R. 14). Sweeney called the office of the Governor and demanded that Hyland not be granted a pardon. He alleged both to the Governor's office and later on television that Hyland had unethically released to the public confidential juvenile court information, an allegation Sweeney knew to be false (E.R. 15, 16, 21). The pardon application was denied (E.R. 79, 73).

After his dismissal Hyland obtained paid employment with the National Center on Institutions and Alternatives ("NCIA"), a private entity (E.R. 7-8, 27). His job was to interview juvenile detainees and write private presenting reports (E.R. 18). Because of his February 1989 memorandum petitioners denied Hyland access to Juvenile Hall, and as a result the NCIA terminated Hyland's work on cases in the San Francisco Juvenile Court (Pet.App. 5, E.R. 27, 19-20).

2. *Proceedings Below.* The District Court, which had jurisdiction under 28 U.S.C. §§ 1343 and 1331, dismissed Hyland's First and Fourteen Amendment claims for failure to state a claim upon which relief could be granted (Pet.App. 35). On the free speech claim the District Court concluded that Hyland's memorandum did not address a matter of public concern as defined in *Connick v. Myers,* 461 U.S. 138 (1983) (Pet.App. 43-44, 47).

The Court of Appeals reversed the dismissal of the First Amendment claim. It held that the deprivation of Hyland's high-level volunteer employment position was a sanction sufficiently serious to trigger First Amendment scrutiny (Pet.App. 8-13). Following the analytic path outlined in *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968) and *Connick*, the Court of Appeals further held that Hyland's memorandum addressed a matter of public concern (Pet.App. 13-20). It remanded for disposition of petitioners' argument that Hyland's speech so severely disrupted office harmony and working relationships that the government's interest in promoting an effective workplace outweighed Hyland's First Amendment rights. The Court of Appeals noted that the application of this balancing test requires a factual inquiry into such matters as whether the speech impairs discipline or obstructs office operations, and concluded that this issue could not be resolved on a motion to dismiss (Pet.App. 20-22). It affirmed the dismissal of the Due Process claims (Pet.App. 22-30).

Petitioners' petition for rehearing by the panel was denied, and their suggestion to the full Court for rehearing in banc was rejected without a dissenting vote (Pet.App. 51).

REASONS FOR DENYING THE WRIT

The petition misapprehends the nature of the decision below and therefore the issues presented. The Court of Appeals' ruling that Hyland could bring a First Amendment claim in the circumstances of this case breaks no new ground, and is supported by decisions of this Court. While whether the government can dismiss for free speech a sometimes-paid volunteer who is temporarily in a non pay status is scarcely a question of general importance or frequent recurrence, this case does not even squarely present that question. Petitioners not only dismissed Hyland from his volunteer position but also caused him to lose his later obtained private employment and otherwise retaliated against him. There are no conflicts between the interlocutory decision below and those of other Circuits, and no other issues presented worthy of further review.

I. THE COURT OF APPEALS' FIRST AMENDMENT RULING IS SUPPORTED BY SETTLED PRINCIPLES AND RAISES NO ISSUES WARRANTING REVIEW.

A. The record shows that the legal issue which petitioners attempt to pose (Pet.App. 4) -- whether the First Amendment prohibits the government from depriving a person of the subjective benefits of serving as a volunteer in retaliation for free speech -- is not squarely presented here. Hyland did not agree to work for free. Petitioners promised Hyland they would use their best efforts to obtain funds, and in fact he was paid $19,900.19 during his twenty one months of employment (E.R. 9-10). Although Hyland had

not received pay since June 1988, petitioners were in the process of obtaining another grant to pay him when he was terminated (Pet.App. 40-41). After the discharge, petitioners engaged in a campaign of retaliation against Hyland, and later deprived him of his subsequently obtained private, paying employment with the NCIA.

Petitioners did more than merely deprive Hyland of the opportunity to perform meaningful work without compensation. Petitioners caused Hyland to suffer a tangible economic loss when they dismissed him from his government position, and an equally tangible economic loss when they caused him to lose his later job in the private sector. Either of these losses by itself, let alone both together, is comparable to that sustained by a probationary employee, who unquestionably can sue under the First Amendment if fired for speech.

B. The Court has held unequivocally that a terminated probationary employee with no property interest in continued employment can maintain a First Amendment claim. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 283-284 (1977). *Accord, Rankin v. McPherson*, 483 U.S. 378, 383-384 (1987). There is no legitimate distinction between the position of Hyland, who was promised that his volunteer position would last until he received a pardon, and that of a non-tenured teacher or probationary employee.

The Court has gone further. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75-79, 110 S.Ct. 2729, 2737-2739 (1990) holds that a First Amendment claim will lie for the failure to promote, transfer, or recall after layoff existing

employees, and even the denial of a job application by a non-employee. See *Elrod v. Burns*, 427 U.S. 347, 359-360 n.13 (1976) (rights are unconstitutionally infringed "both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason"); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (government may not "deny a benefit to a person because of his constitutionally protected speech"); and *Shelton v. Tucker*, 364 U.S. 479, 488-490 (1960) (government may not alter the employment status of a public employee for exercising first amendment guarantees). It is therefore not apparent how the decision below could be seriously disputable, even if Hyland's only injury had been that caused by the loss of a meaningful but unpaid volunteer position.

C. Whether Hyland is deemed a private citizen or a public employee, the decision below is correct. Private citizens enjoy the broadest possible scope of First Amendment protections. Their insulting, and even outrageous, speech is protected. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). First amendment protections are at their zenith when private citizens attack the government. *E.g., Carey v. Brown*, 447 U.S. 455, 467 (1980). Where government employees are involved, *Connick, supra*, 461 U.S. 138, and related cases recognize the need to balance the interests of the government as employer against the interests of the employee in free speech. Public employees can be fired for speech on matters of private concern, *id.* at 146-147; and employees who speak even on matters of public concern can be disciplined if the speech seriously disrupts the employer-employee relationship, *id.* at 150-151.

Contrary to petitioners' argument, the Court of Appeals did not extend newly created First Amendment rights to government employees who serve as volunteers. Instead it applied to Hyland the holdings of *Connick*, under which a public employee must overcome higher hurdles than a private person. *See Havekost v. United States Department of the Navy,* 925 F.2d 316, 318-320 (9th Cir. 1991) (non-employee licensee's claim not actionable because speech on issues of private concern). There are no cases which require a volunteer to meet yet a higher standard.

Hyland was either a private citizen entitled to the broadest possible free speech rights, or a public employee (or the functional equivalent) whose free speech interests are balanced against the government's interest in an efficient workplace. He cannot be both, and petitioners cannot have this issue both ways. If Hyland's employment status was sufficiently important that his First Amendment claim could be defeated by a showing that his speech seriously disrupted the employer-employee relationship, as petitioners insist (Pet.App. 22), then the termination of that employment status is a sanction sufficiently non-trivial to give rise to a First Amendment claim.

The Court of Appeals' ruling on this issue, to the extent adverse to petitioners, was correct. Further, whether or not petitioners' actions are sufficient to support a First Amendment claim under the highly unusual facts present here does not raise a question of general importance warranting certiorari, especially at this interlocutory stage.

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS AND IS OTHERWISE UNWORTHY OF REVIEW.

A. Contrary to petitioners' imprecise assertion (Pet. 16; *see id.*, at 14) the Court of Appeals did not hold that independent contractors and licensees may bring actions for retaliation based on speech or affiliation. Equally unsound is petitioners' newly discovered argument -- which the Court of Appeals did not address because it was not made to the panel -- that the result below conflicts with cases such as *Downtown Auto Parks, Inc. v. City of Milwaukee,* 938 F.2d 705 (7th Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 640 (1991), and *LaFalce v. Houston,* 712 F.2d 292 (7th Cir. 1983), *cert. denied,* 464 U.S. 1044 (1984).

Those cases involved independent contractors engaged in political patronage and lobbying activities. The Seventh Circuit distinguished them from cases like this one, involving employees sanctioned for free speech. While recognizing that government employees are protected from retaliation for party affiliation, *LaFalce, supra,* 712 F.2d at 293, and *Downtown Auto Parks, supra,* 938 F.2d 708-709, reasoned that independent contractors were sufficiently different to justify a different result. *Downtown Auto Parks, supra,* at 710, also seemed to distinguish between party affiliation and lobbying activities on the one hand, and free speech on the other. *See also, Rutan v. Republican Party of Illinois,* 868 F.2d 943, 954 n.4 (7th Cir. 1989) *(in banc), reversed on other grounds,* 497 U.S. 62 (1990) (First Amendment already prohibits "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising

her free speech rights"). Assuming *Downtown Auto Parks* and its predecessors can be reconciled with the Court's decision in *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 75-79 (1990), which is not certain, those decisions turn on issues not presented here, and therefore are of no assistance to petitioners.

The only free speech cases petitioners cite or of which we are aware involving dismissed volunteers imply or assume that their loss is actionable. *See Janusaitis v. Middlebury Volunteer Fire Dep't.,* 607 F.2d 17 (2nd Cir. 1979), which implicitly concluded that the loss of a volunteer position supports a free speech claim, and *Versarge v. Township of Clinton New Jersey,* 984 F.2d 1359, 1364 (3rd Cir. 1993), which assumed without deciding that it would. There is therefore no conflict among the Circuits.

B. The Court of Appeals did not hold that the ultimate balance required by *Pickering* and *Connick* is a question of fact instead of law. *See* Pet.App.7; *compare* Pet. 22. It ruled instead that petitioners' argument that Hyland's memorandum so severely disrupted office harmony and working relationships as to outweigh his free speech rights entailed an inquiry into factual matters which could not be resolved on petitioners' motion to dismiss on the pleadings (Pet.App. 7,22). There is no conflict between this interlocutory ruling and those decisions cited by petitioners (Pet. at 23), which address the deference due by appellate courts to factual findings in District Court made after a trial, or rulings at the summary judgment stage.

C. After arguing at length that Hyland's volunteer position was trivial enough that its deprivation does not warrant First Amendment scrutiny, petitioners abruptly shift

fields and assert (Pet. 23-24) that Hyland's position was so important as to fall "into that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech." *Hall v. Ford,* 856 F.2d 255, 264 (D.C.Cir. 1988), quoting *Gonzalez v. Benavides,* 712 F.2d 142, 150 (5th Cir. 1983). It is not surprising that the Court of Appeals failed to address this far-fetched argument, since petitioners did not make it to the panel. This case hardly presents the question whether Hyland's position was of sufficient policy making importance to permit his discharge, consistent with the First Amendment, for non-disruptive free speech on matters of public concern.

CONCLUSION

Certiorari should be denied.

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Supreme Court, U.S.
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No. 92-1478

IN THE SUPREME COURT OF THE

UNITED STATES

ROY L. WONDER et al.,

Petitioners,

vs.

LANRIC HYLAND,

Respondent.

BRIEF OF CALIFORNIA CITIES AMICUS CURIAE ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

		Page
I.	INTEREST OF THE CITIES	3
II.	ARGUMENT	3
III.	CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page(s)

Board of Regents v. Roth,
426 U.S. 564 (1972) 7

Elrod v. Burns,
427 U.S. 347 (1976) 12

Manhattan Beach Police Officers
Association v. City of Manhattan Beach,
881 F.2d 816 (1990) 10

OTHERS

Supreme Court
Rule 36.4 1

IN THE SUPREME COURT

OF THE

UNITED STATES

ROY L. WONDER et al.,

Petitioners,

vs.

LANRIC HYLAND,

Respondent.

BRIEF OF CALIFORNIA CITIES AMICUS CURIAE

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 36.4 the California cities of Atherton, Alameda, Anaheim, Apple Valley, Atwater, Bellflower, Berkeley, Big Bear Lake, Brea, Burbank, Burlingame, Canyon Lake, Carlsbad, Cathedral

City, Chula Vista, Commerce, Costa Mesa, Dana Point, Del Rey Oaks, Dinuba, El Paso de Robles, Escondido, Eureka, Fairfield, Glendale, Grover Beach, Huron, Indio, La Mesa, Lomita, Long Beach, Los Altos, Marina, Milpitas, Monterey, Murietta, Nevada City, Oakland, Orange Cove, Oxnard, Pacifica, Palm Desert, Paramount, Pleasant Hill, Redding, Rialto, Rohnert Park, Rolling Hills Estates, Roseville, San Jose, San Pedro, San Rafael, San Juan Batista, San Luis Obispo, San Buenaventura, San Marcos, Santa Barbara, Santa Cruz, Santa Rosa, Santa Maria, Solana Beach, Sunnyvale, Temecula, Tiburon, Twentynine Palms, West Covina, and West Hollywood, ("Cities"), as authorized by their respective law officers set forth on the Appendix hereto, support as amicus curiae, the Petitioners Roy L. Wonder et al., for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case reported at 972 F.2d 1129 and attached as an Appendix to the Petition.

I.

INTEREST OF THE CITIES

The Cities named above are located throughout California and differ from one another in numerous respects. They all, however, share concerns similar to the City and County of San Francisco, the primary petitioner herein. Among those concerns is the necessity of delivering local government services with the use of volunteers on a regular and ad hoc basis. The extent to which such assistance can be used in the future by Cities in providing necessary services under severe budget restraints will be severely impacted if the decision below stands. Cities will focus herein on the broader implications of the Ninth Circuit's decision and its impact on a variety of local government functions.

II.

ARGUMENT

The factual background of the case is set forth at pages 6-9 of the Petition to which reference is made. Cities will not

repeat those facts here except to the extent necessary to support their arguments.

San Francisco took a chance by permitting a convicted felon, Respondent Lanric Hyland, to participate as a volunteer in its juvenile justice system. Hyland's rationale for service was his asserted experience with problems of juvenile incarceration and his desire to be pardoned by the Governor of California so that he could ultimately serve as a state peace officer. Hyland rewarded San Francisco's efforts toward his rehabilitation by attempting to disrupt its internal administrative-supervisory process in the form of a lengthy memorandum directed to the judges of the juvenile court over the head of his immediate superior. In that memorandum he urged termination of a managerial employee because of defects in San Francisco's juvenile hall operation which were a matter of public record.

Hyland's volunteer status was terminated by his superior and he was denied

further access to juvenile hall. Shortly thereafter, he obtained other employment in the same field and filed an action in District Court contending, among other things, that he had been deprived of property rights without due process and suffered retaliation for exercise of rights protected under the First Amendment.

In its decision, the Ninth Circuit did not base its decision on whether Hyland was a public employee. Indeed, it held that even if he was, the employment relationship was so tenuous that it did not rise to the level of a constitutionally protectable "property" interest. However, the Ninth Circuit also held that Hyland's memorandum had been an exercise of First Amendment rights and Petitioners had retaliated against him by removing him from his volunteer position.

Until this decision, loss of a volunteer position without pay or any related benefits would have been nonjudiciable in light of a long line of cases in

other circuits, many of which are cited at page 14 of the Petition. The Ninth Circuit has now created a new level of "property" in holding that the "opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege, the deprivation of which can trigger First Amendment scrutiny." (Petition, App. 10).

The reasons for this conclusion are that a volunteer "gains valuable experience in education and public administration and can make professional contacts" and such service also "provides an individual the satisfaction of making a contribution, or giving something back, to society." (Petition, App. 11).

The decision of the Ninth Circuit is inherently contradictory in that it rejects the notion of a property right in a volunteer position and yet creates a new class of property that is protectable under the First Amendment. Moreover, this new class of property is so abstract and

amorphous as to be incapable of precise definition.

Violation of a Federally protected benefit necessarily implies that the nature and scope of that benefit is subject to rational analysis and definition. It has to be more than a mere unilateral expectation. Board of Regents v. Roth, 426 U.S. 564, 577 (1972).

There is a nexus between property rights protectable under the Due Process Clause of the Fourteenth Amendment and governmental benefits or privileges protectable against retaliation for exercise of First Amendment rights. In order for that benefit or privilege to exist sufficient to give it protection under the First Amendment it must be discernible to the extent that it can be defined in the same way that property has been defined under Board of Regents v. Roth, supra.

No such definition exists in the Ninth Circuit's decision and Cities respectfully suggest that a governmental benefit or

privilege must have at least the same level of entitlement as a job, a right to receive welfare payments or a license to engage in business activities in order to be protectable. No such certainty exists here, and if the decision is allowed to stand, it places Cities at considerable risk in operation of their volunteer programs.

All cities, to a greater or lesser extent, rely on volunteers to perform any number of governmental services relating to planning, land use, recreation, culture, long-range studies, intergovernmental relations, public safety review, and others too numerous to mention. In the Ninth Circuit's view, every one of those volunteers now has a "valuable" governmental privilege and may express views considerably at odds with the City's position or even destructive to the program. That person may now only be removed by engaging in the tedious and expensive process, which may include litigation, of scrutinizing the challenged

activities and balancing the individual's rights against the government's rights.

Any number of problems could arise if this ruling stands. As one example, suppose the residents of a city had adopted a growth management ordinance by a vote of the people to regulate land-use control (as is possible in California under state law), with the support of the entire elected city council. The city council then appoints a volunteer citizens' group to advise on the details of implementing that ordinance. Under the Ninth Circuit's decision, if one of those volunteers loudly opposed the entire concept of growth management, that person could not be removed without an exhaustive scrutiny and balancing. There would be nothing to prevent that individual from opposing the growth management program outside his/her status as a volunteer on the citizens' committee and he/she simply would not be able to do so under the imprimatur of a government-sponsored committee. Where is

the valuable benefit or privilege that the individual has lost?

Assume further, that this particular individual had vigorously opposed the growth management ordinance during the electoral campaign and thereafter requested the city council to appoint him/her to the committee for implementing the ordinance. Under the Ninth Circuit's decision, if the city council refused to appoint this individual on the grounds of previously-expressed views on a matter of public concern, he/she would be suffering deprivation of a valuable privilege.

The Ninth Circuit found in Manhattan Beach Police Officers Association v. City of Manhattan Beach, 881 F.2d 816, 819 (1989) that a failure to provide a desired assignment to a public employee in retaliation for exercise of First Amendment rights was protectable even though there was no loss of pay or benefits. In Manhattan Beach, the plaintiff was already a public employee and the desired assignment was at

least an element of employment status. In the hypothetical posed above, a citizen with no status at all could be forced onto the committee if the Ninth Circuit decision stands.

Taking this hypothetical one last step, if a candidate for mayor defeats another candidate in a fiercely contested election involving strongly contradictory political views of a city's future programs and that winning candidate thereafter forms a volunteer citizens' committee to assist him in implementing his campaign platform, his erstwhile opponent could make a claim to membership on that committee under the Ninth Circuit's decision.

The Ninth Circuit's characterization of Hyland as a "high-level" volunteer implies that where such a person is in a decisionmaking capacity or close to such capacity, his privilege or benefit is even more valuable and he is afforded greater First Amendment protection. This is completely in contradiction to this Court's

view, as expressed in Elrod v. Burns, 427 U.S. 347 (1976) and following cases, in which it is held that there is considerably greater latitude to make termination decisions with respect to public employees in decisionmaking or confidential capacities.

There are also numerous current examples of the problems created for the Cities by the Ninth Circuit's decision in this case. Most public zoos, museums, hospitals and libraries use volunteer services to a significant extent. A zoo could be sued for refusing to accept the services of volunteers who actively oppose the confinement of wild animals on philosophical grounds and seek their immediate release. Museums could be sued for failing to include on their volunteer staff persons who believe that museums should be abolished and all artifacts returned to their native habitat. Hospitals could be sued for refusing to include among their volunteers persons who actively (and sometimes violently) oppose certain forms of medical

research that may be conducted in those hospitals. Libraries could be sued for refusing to include on their staff volunteers who have expressed strong beliefs in the removal of certain materials from library stacks on the basis of religion, morals or politics.

Cities are currently suffering from significant budget shortages and a decline of local tax revenues. Over the years, to a greater or lesser extent, they have used volunteers to provide needed services without the financial or legal burdens that formal employment relationships entail. In addition, volunteer relationships have been used as a means of providing grass-roots citizen involvement and a fresh perspective on public issues.

This decision sends a message that it is unwise to use a volunteer program, especially in any controversial area or one subject to political debate, because it may be creating the equivalent of an unpaid civil service system and the significant

obligations that go with such a system. Cities will be especially deterred from "taking a chance" on an individual with a problematic background who might or might not perform adequately.

III.

CONCLUSION

For the reasons set forth above, Cities pray that this Court issue its writ of certiorari so that the issues described herein and in the Petition may be fully reviewed and determined for the guidance of all concerned.

DATED: April 2, 1993

Respectfully submitted,

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No. 92-1478

In The

Supreme Court of the United States

October Term, 1992

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Petitioners,

vs.

LANRIC HYLAND,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

Hyland's Opposition to the Petition For Writ Of Certiorari ignores the determinative issues upon which the Court of Appeals decision is based. Hyland does not even address the Court of Appeals' conclusion that the "opportunity to volunteer" constitutes a "valuable governmental benefit." Instead, Hyland opposes the Petition by asserting issues and facts specifically rejected by the Court of Appeals.

The conclusion is clear: Even Hyland, who received the original benefit of the Court of Appeals decision, cannot find any basis to support it. The Petition For Writ of Certiorari should be granted.

Hyland's Opposition Mischaracterizes the Court of Appeals' Decision

Hyland apparently recognizes that the "opportunity to serve as a volunteer" is not a sufficiently valuable governmental benefit to justify federal judicial intervention under the standards set forth in *Perry v. Sindermann*, 408 U.S. 593 (1972). Thus, he opposes the Petition for Certiorari by asserting that "Whether the First Amendment prohibits the government from depriving a person of the subjective benefits of serving as a volunteer in retaliation for free speech . . . is not squarely presented here." Opp. 5. Hyland bases his Opposition on the contention that he was an employee rather than a volunteer.

However, the Court of Appeals expressly rejected Hyland's contention stating: "The relevant question, for the purposes of Hyland's First Amendment claim, is not whether Hyland was a public employee, but rather *whether the opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny.*" App. 10, emphasis added. Hyland's Opposition completely ignores the critical conclusion on which the decision is predicated.

Significantly, throughout this litigation, Hyland has relied upon the same facts he has cited here. Both the district court and Court of Appeals concluded that these facts did not render him an employee. The Court of Appeals explicitly found that although Hyland received compensation from January through June 1988, at

the time of his dismissal eight months later he "served the JPD *as a volunteer.*" App. 3, emphasis added. While the Opposition makes much of Hyland's hope that a grant might materialize to provide compensation in the future, that hope was entirely speculative and in any event could not retroactively transform his volunteer status for services already provided into employment.[1]

Thus, neither Hyland's framing of the issues nor asserted factual support for those issues have any relationship to the decision of the Court of Appeals or the propositions for which the decision will be, and indeed already has been cited – namely, that the opportunity to serve as a volunteer is a valuable governmental benefit. *See Versarge v. Township of Clinton New Jersey*, 984 F.2d 1359 (3rd Cir. 1993).

The Issues Presented Are of Enormous Importance To Public Employers

Hyland also contends that even if the case does stand for the proposition that the opportunity to serve as a volunteer is protected, the facts here are "highly unusual," rendering it of limited importance. Nothing in the opinion or the record supports this view. More importantly, it certainly is not shared by public entities. Sixty-seven California cities joined the California League of Cities in filing an amicus brief in support of the Petition for Writ of Certiorari. They did so because of the enormous potential impact of this decision on public entities.

There are two reasons why public entities throughout the country are concerned about the impact of the decision in this case.

First, the Court of Appeals' decision is not limited to the allegedly "unusual" facts of this case. Instead, the Court of Appeals creates a broad new class of valuable governmental benefits which by its express terms applies to any public volunteer situation. Public entities make extensive use of volunteers in their hospitals, zoos, museums, correctional institutions, schools, legislatures,

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[1] Indeed, Hyland's theory violates settled California law prohibiting retroactive pay for services already performed (Cal. Const., Art. XI §10(a)), and providing that public employment must conform to statute. *Williams v. Los Angeles City Dep't of Water & Power*, 130 Cal.App.3d 677, 181 Cal.Rptr. 868 (1982).

libraries, courts, commissions, police functions, youth programs, parks, recreational facilities and election processes. In light of this extensive use of public volunteers, it is simply absurd to suggest that the decision is of little importance and impact. If the decision stands, the mere opportunity to volunteer itself will become a "valuable governmental benefit" that cannot be withheld or restricted in response to speech.

Second, the impact of the Court of Appeals' decision is not limited solely to issues pertaining to volunteers. The broad language of the decision supports the conclusion that virtually any opportunity created by government which could potentially provide "experience," "education," "professional contacts," "expertise," "knowledge" or even "satisfaction" is now a valuable governmental benefit that cannot be withheld on the basis of speech. App. 11.

In creating this broad new class of benefits, the Court of Appeals has departed from the *Perry* standards which courts have previously held limit such benefits to matters which are 1) created by statute; 2) objectively valuable; and 3) of direct and immediate benefit to the recipient. This departure opens the courthouse doors to disputes regarding an unlimited variety of "valuable governmental benefits."

The Court of Appeals' Decision Conflicts With Other Circuits

Hyland asserts that the independent contractor cases cited by petitioners are not in conflict with the decision here. He argues that the reasoning applicable to patronage or lobbying cases such as *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. den.*, ___ U.S. ___, 112 S.Ct. 640 (1991), and *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. den.*, 464 U.S. 1044 (1984) does not apply to free speech cases. This assertion is incorrect. As stated in *Hall v. Ford*, 856 F.2d 255, 262-63 (D.C. Cir. 1988):

> The *Elrod-Branti* line is premised upon concerns similar to those animating the employee speech cases. The *Elrod* plurality [citation omitted] relied upon *Perry v. Sindermann* [citation omitted], a

Pickering case. As a general rule, the government cannot condition employment on the compromise or relinquishment of a constitutional right, be it freedom of belief and association (*Elrod*) or freedom of speech (*Pickering*).

Further, Hyland's attempt to distinguish these cases makes no sense. Under his theory, a public entity is not free to take action based upon speech but may take the same action based upon lobbying activities, political beliefs or affiliations. Petitioners respectfully submit that if the opportunity to serve as a volunteer is entitled to First Amendment protection, there is no logical way to limit that principle so that it does not extend to lobbying activities, political affiliations and beliefs.[2]

The Court of Appeals Decision is in Conflict With Other Circuits Regarding the Appropriate Standards for Balancing Under *Pickering/Connick*

Finally, without discussion, Hyland asserts that the Court of Appeals appropriately remanded for balancing under *Pickering/Connick*. The Court of Appeals' conclusion that such balancing is a question of fact, not law, is directly contrary to other circuits cited in the Petition.

While remand might be appropriate in the absence of a factual record, here the relevant facts are admitted in Hyland's 100 pages of complaint and exhibits. Hyland may now wish to bury his complaint, but the admissions made in the complaint required the Court of Appeals to balance as a matter of law.

Further, as applied in the free speech context, the *Elrod/Branti* analysis provides that individuals in confidential or policymaking positions may be terminated without violating

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[2] Interestingly, Hyland questions whether the independent contractor cases can be reconciled with this court's decision in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75-79 (1990). Opp. 10. This question itself calls out for review in this case. In the absence of direction from this Court, the circuits have decided that *Rutan* is inapplicable to cases outside the employment area. This case presents an excellent vehicle for addressing these issues.

the First Amendment. The analysis requires resolution of three questions: 1) does the employee operate in an area affecting policy; 2) is the employee a confidential or policy level employee; and 3) is the government's "interest in accomplishing its organizational objectives through compatible policy level deputies . . . implicated by the employee's speech?" To fall outside First Amendment protections, "the employee's speech must relate to policy areas for which he is responsible." *Hall,* 856 F.2d at 264.

It is clear from the face of Hyland's complaint, and indeed, from the face of the Court of Appeals' decision, that, while not employment, Hyland's status as a volunteer met each of these tests. Further, his speech was directly related to the very policy areas to which he had been assigned as a volunteer. Thus, the Court of Appeals was required to examine and rule on these issues as a matter of law.

CONCLUSION

Hyland's Opposition does not address the central issue and holding of the Court of Appeals' decision. The reasons cited by Hyland for rejecting the Petition do not withstand even minimal scrutiny. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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